TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1959

No. 130

WILLIA NIUKKANEN, ETC., PETITIONER,

vs.

E. D. McALEXANDER, ETC.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED JUNE 20, 1959
CERTIORARI GRANTED OCTOBER 12, 1959

No. 15990

United States
Court of Appeals
for the Ninth Circuit

WILLIA NIUKKANEN, also known as William Albert Mackie, Appellant,

vs.

E. D. McALEXANDER, Acting District Director, Immigration and Naturalization Service, Department of Justice, Appellee.

Transcript of Record

Appeal from the United States District Court
for the District of Oregon

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

PETERSON, POZZI & LENT,
NELS PETERSON,
Loyalty Building,
Portland, Oregon,

GERALD H. ROBINSON,
1106 Failing Building,
Portland 4, Oregon,

Attorneys for Appellant.

C. E. LUCKEY,
United States Attorney,

VICTOR E. HARR,
Assistant United States Attorney,
United States Courthouse,
Portland, Oregon,

Attorneys for Appellees.

In The United States District Court
For The District of Oregon

Civil No. 9741

WILLIA NIUKKANEN, also known as WILLIAM NIUKKANEN, also known as WILLIAM ALBERT MACKIE, Petitioner,

vs.

JOHN P. BOYD, District Director, Immigration and Naturalization Service, United States Department of Justice, and ERNEST HOVER, Officer in Charge, Immigration and Naturalization Service Office, United States Department of Justice, at Portland, Oregon,

Respondents.

PETITION FOR WRIT OF HABEAS CORPUS AND COMPLAINT FOR INJUNCTIVE RELIEF TO PREVENT AGENCY ACTION

Comes Now Petitioner, Willia Niukkanen, and respectfully shows the Court and alleges:

I.

That the jurisdiction of this Court arises under United States Code, Title 28, Section 2241; United States Code, Title 5, Section 1009; United States Code, Title 28, Section 2201 and 2202. This is an action where petitioner is now in the custody of a person and restrained of his liberties under color or authority of the United States; and where review of administrative proceedings looking toward

petitioner's deportation from the United States as an alleged alien, unlawfully in the United States, is authorized pursuant to Section 10 of the Administrative Procedures Act; and wherein an actual controversy exists between petitioner and respondents, John P. Boyd and Ernest Hover, concerning the authority of said respondents further to continue custody over petitioner or to change the form of such custody or to detain him in actual physical confinement, subject to a declaratory judgment of this Court; and wherein injunctive relief to prevent irreparable injury to or harm to petitioner and to effectuate the review of said administrative proceedings is required.

II.

Petitioner is now in the custody of this Court by virtue of having heretofore been released upon bail by order of this Court.

III.

Respondent, John P. Boyd, is the District Director of Immigration and Naturalization, Seattle, Washington, and respondent, Ernest Hover, is a citizen of the United States and a resident of Portland, Oregon, who has been designated by the respondent, John P. Boyd, to exercise custody over petitioner. Respondent, Ernest Hover, is the Officer in Charge of the Office of the Immigration and Naturalization Service of the United States Department of Justice, in the City of Portland, Oregon.

IV.

Petitioner is a permanent resident of the City of Portland, Oregon, residing in premises located at 4326 North Montana Street, Portland, Oregon.

V.

That on or about the 17th day of June, 1952, respondent, John P. Boyd, issued a warrant for the arrest of petitioner, reciting as follows:

> "Whereas, from evidence submitted to me, it appears that the alien Willia Niukkanen alias William Niukkanen alias William Albert Mackie who entered this country at Sault Ste. Marie, Michigan, on the 5th day of September, 1909, has been found in the United States in violation of the immigration laws thereof, and is subject to be taken into custody and deported pursuant to the following provisions of law, and for the following reasons, to-wit: The Act of October 16, 1918, as amended, in that he has been, after entry, a member of the following class, set forth in Section 1 of said Act: An alien who was a member of the Communist Party of the United States."

That said warrant was served upon petitioner on or about the 12th day of September, 1952, at Portland, Oregon, and that thereafter a written notice signed by Roy J. Norene, and dated April 7, 1953, was served upon petitioner directing him to appear on May 11, 1953, at a certain place in the United

States Court House at Portland, Oregon, for a hearing to enable him to show cause why he should not be deported. That a purported hearing entitled "In re: Willia Niukkanen or William Niukkanen, now known as William Albert Mackie, In Deportation Proceedings, File: A-508530" was thereafter held before one Louis C. Hafferman, designated "Special Inquiry Officer" and participated in by one Howard L. Fenn, designated "Examining Officer." That after completion of said hearing, said Louis C. Hafferman issued a written decision holding petitioner deportable. That upon said decision, petitioner appealed from the order of said "Special Inquiry Officer" to the United States Department of Justice, Board of Immigration Appeals; that upon such appeal respondent contended that the evidence of record was insufficient to establish deportability and that the statute under which the charge had been laid was unconstitutional.

VI.

That petitioner duly filed and perfected an appeal to the Board of Immigration Appeals; that under the date of September 18, 1953, a written decision signed by one Thomas G. Finucane, as chairman of said Board of Immigration Appeals was issued, containing, among other things, the following:

> "Order: It is ordered that the appeal be and the same is hereby dismissed."

VII.

That on or about November 15, 1954, said Roy J.

Norene directed petitioner to appear on November 30, 1954, for deportation; that on or about November 16, 1954, petitioner duly filed with the United States Department of Justice, Immigration and Naturalization Service, a motion to reopen proceedings in order that petitioner might have an opportunity to apply for suspension of deportation, based upon the affidavit of petitioner; that thereafter by order dated November 29, 1954, said motion was denied by order which provided inter alia as follows:

> "Order: It is ordered that the motion be and the same is hereby denied."

That thereafter and on December 9, 1954, petitioner filed a supplemental motion to reopen proceedings with supporting supplemental affidavit in order that petitioner might have an opportunity to apply for suspension of deportation; that by letter dated December 8, 1954, said Roy J. Norene, predecessor in office to respondent Ernest Hover, directed William P. Mackie as bondsman for petitioner to surrender petitioner to his office on Monday, December 13, 1954, said letter in part providing as follows:

> "It is expected that he will be leaving Portland for Finland the same day."

That said supplemental motion to reopen proceedings and to stay execution of the order of deportation was duly and regularly filed and that application was made to said Roy J. Norene to stay execution of said order pursuant to regulation prom-

ulgated by the Attorney General of the United States, (Title 8, Code of Federal Regulations). That thereafter a hearing was held upon said application and by order dated May 13, 1955, by the U. S. Department of Justice, Board of Immigration Appeals, petitioner's application for suspension was denied, as shown by the copy thereof attached hereto and marked Exhibit "A" and made a part hereof.

VIII.

That thereafter, petitioner filed a petition and an amended petition for writ of habeas corpus and a complaint for injunctive relief to prevent agency action in the United States District Court for the District of Oregon; that a hearing upon said complaint was held in said Court with the result that the Court dismissed said complaint; that thereafter an appeal was prosecuted from said complaint which was designated in this Court as Civil No. 7833, to the United States Court of Appeals for the Ninth Circuit, which Court affirmed the judgment of the said District Court; thereafter petitioner applied for a writ of certiorari from the United States Supreme Court but said writ was denied on December 16, 1957, by said United States Supreme Court.

IX.

That thereafter the petitioner filed a motion for a new hearing with the United States Department of Justice, Board of Immigration Appeals, on the grounds that on the 9th day of December, 1957, the United States Supreme Court decided the case of

"Rowoldt v. Perfetto", 355 U.S. 115, which decision so redefined the substantial and evidential requirements of membership in the Communist Party of the United States as to take petitioner out of the class of deportable aliens under the Immigration and Nationality Act; that on the 26th day of March, 1958, the said Board of Immigration Appeals, acting by and through its chairman, Thomas G. Finucane, did render an opinion and decision which states, among other things, as follows:

> "Order: It is ordered that the motion be and the same is hereby denied."

X.

That thereafter the respondent Ernest Hover has indicated his intention by statements to the press and otherwise of causing the said petitioner to be taken into custody and to be deported from the United States; and that said action of deportation is imminently planned.

XI.

That unless injunctive relief hereinafter requested is granted petitioner will suffer irreparable injury by being taken into physical custody by respondent Ernest Hover, and will be denied liberty without due process of law; that petitioner has exhausted his administrative remedy.

XII.

That in order to afford proper relief to petitioner herein, it is indispensable that this Court review

the whole record of such administrative proceedings before the said Louis C. Hafferman, Roy J. Norene, and the Board of Immigration Appeals; that said record has previously been ordered produced by this Court in the case of this petitioner v. John P. Boyd and Roy N. Norene, Civil No. 7833, previously referred to herein, and this Court should cause said record to be taken from the files of this Court and placed in the file of this case in order that review of the whole record may properly be had.

XIII.

That the administrative proceedings and the order of deportation made by the said Louis C. Hafferman as hereinbefore referred to, and the Board of Immigration Appeals as set forth herein, were arbitrary, capricious, and not in accordance with law, were contrary to the constitutional rights, privileges and immunities of the petitioner, and deprived petitioner of rights under the laws relating to deportation of aliens and were without observance of said Constitution of the United States and the laws of the United States as interpreted by the United States Supreme Court. That the denial of a new hearing on the question of petitioner's eligibility for deportation by the Board of Immigration Appeals on March 26, 1958, was arbitrary, capricious, and not supported by substantial and creditable evidence in the record.

XIV.

That petitioner is not a person subject to de-

portation under the provisions of law on which said deportation proceedings are founded in that petitioner is not and never has been a member of the Communist Party, and particularly, has not been a member of the Communist Party after entry into the United States. That petitioner is not subject to deportation by reason of the fact that he has never been afforded a fair hearing upon the charges made against him in the warrant of arrest and said lodged charge; that petitioner is not subject to deportation by reason of the fact that he has never been afforded a fair hearing upon the question of whether or not his membership in the Communist Party, if admitted arguendo, was such a meaningful association as is required by the Immigration and Nationality Act as interpreted by the United States Supreme Court in the case of Rowoldt v. Perfetto as hereinabove referred to. That furthermore petitioner is not subject to deportation by reason of the fact that on the record heretofore made there is no substantial, reasonable, or probative evidence to show that petitioner's alleged association with the Communist Party was of the meaningful type of association required by the United States Supreme Court in the aforesaid decision. That said deportation proceedings were not conducted in accordance with Part 242, Chapter 1, Title 8, Code of Federal Regulations, and Section 242 of the Immigration and Nationality Act of 1952. That petitioner has been deprived of due process of law in the conduct of said deportation proceedings and

said hearing and that the findings of fact and conclusions of law and the order of deportation based thereon, and the subsequent orders of the Board of Immigration Appeals, were arbitrary, capricious, and not in accordance with law, were contrary to the constitutional rights, privileges and immunities of the petitioner, and deprived petitioner of rights under the Immigration and Nationality Act, and were without observance of the procedure required thereby and the regulations promulgated under said Immigration and Nationality Act. That furthermore said findings of fact and conclusions of law and the order of deportation, and further orders of the Board of Immigration Appeals, were not based upon reasonable, substantial and probative evidence. That the statutes upon which said deportation proceedings are based are unconstitutional and that petitioner is immediately threatened with deportation and deprivation of his liberty without due process of law.

XV.

That the Act of October 16, 1918, as amended (Section 22 of the Internal Security Act of 1950), insofar as they make past membership in the Communist Party of the United States grounds for deportation, are null and void as being bills of attainder in violation of the United States Constitution, Article I, Section 9, Clause 3.

XVI.

That the Act of October 16, 1918, as amended

(Section 22 of the Internal Security Act of 1950), insofar as they make past membership in the Communist Party of the United States grounds for deportation, are unconstitutional as being ex post facto laws.

XVII.

That the Act of October 16, 1918, as amended (Section 22 of the Internal Security Act of 1950), insofar as they make past membership in the Communist Party of the United States grounds for deportation, are null and void and unconstitutional as being in violation of the First and Fifth Amendments to the United States Constitution, in that such statutes abridge the right of freedom of speech of aliens, and particularly of this petitioner, and operate to deprive aliens, and particularly this petitioner, of liberty without due process of law.

XVIII.

That the denial of petitioner's application for suspension is arbitrary, capricious and an abuse of discretion, assuming, arguendo, that petitioner is otherwise deportable.

XVIV.

That petitioner has exhausted all administrative remedies available to him and is without recourse of law, except as this Court may grant him relief by way of review, declaratory judgment, injunction and writ of habeas corpus.

XX.

That petitioner is entitled to a review of said

administrative proceedings, and upon said review, said proceedings should be set aside and declared null and void; that, alternatively, petitioner should be granted suspension of deportation.

Wherefore, Petitioner prays relief as follows:

1. That respondents, and each of them, be restrained and enjoined during the pendency of this action from taking the petitioner or causing petitioner to be taken into actual physical custody, and that respondents, and each of them, be restrained and enjoined during the pendency of this action from deporting petitioner or causing petitioner to be deported and that respondents, and each of them, be restrained and enjoined during the pendency of this action from removing the petitioner from the State of Oregon and the jurisdiction of this Court.

2. That this Court order and direct that petitioner be released from the physical custody of respondent Ernest Hover and respondent John P. Boyd, or either of them, and petitioner be enlarged upon such terms as shall be determined by this Court during the pendency of this action.

3. That this Court issue a Writ of Habeas Corpus permanently discharging petitioner from custody of any person or persons whomsoever, and especially from the custody of respondents John P. Boyd and Ernest Hover.

4. That this Court transfer the whole and entire record of said administrative deportation proceed-

ings from the file in Civil No. 7833 to the file in this case; and that the respondents be required to produce all written motions, applications, and other papers and requests filed in said proceedings since the denial of petition for writ of certiorari in the aforesaid case as hereinabove recited.

5. That this Court declare and adjudge:

(a) That the order of deportation contained in the written decision of the said Louis C. Hafferman hereinbefore referred to be declared null and void.

(b) That the orders contained in the written decisions signed by the said Thomas G. Finucane, as chairman of the Board of Immigration Appeals dated September 8, 1953 and March 26, 1958 be declared null and void.

(c) That all orders or directions of respondents or either of them ordering or directing the surrender of petitioner and for deportation of him be declared null and void.

(d) That petitioner did not receive a fair hearing.

(e) That there was no reasonable, substantive and probative evidence adduced in said administrative proceedings to support said orders of deportation.

(f) That the Act of October 16, 1918, as amended (Section 22 of the Internal Security Act of 1950) be declared void and unconstitutional as being in violation of the Fifth Amendment to the United States Constitution.

(g) That the Act of October 16, 1918, as amended (Section 22 of the Internal Security Act of 1950), insofar as they make past membership in the Communist Party of the United States grounds for deportation, be declared null and void:

(1) as being bills of attainder in violation of the United States Constitution, Article I, Section 9, Clause 3, or

(2) as being ex post facto laws, or

(3) in violation of the First and Fifth Amendments to the United States Constitution in that such statutes abridge the right of freedom of speech of aliens, and particularly of this petitioner, and operate to deprive aliens, and particularly this petitioner, of liberty without due process of law.

6. That this Court restrain and enjoin respondents during the pendency of this action from taking petitioner into actual physical custody.

7. That this Court order, direct and declare that all pending deportation proceedings against petitioner are unlawful, null and void.

8. That, alternatively, suspension of deportation of petitioner be ordered by this Court.

9. That this Court grant such other, further, or different relief as may be found to be just, proper, equitable and meet in the premises.

PETERSON, POZZI & LENT, and
GERALD H. ROBINSON,
/s/ By GERALD H. ROBINSON,
Of Attorneys for Petitioner.

EXHIBIT "A"

U. S. Department of Justice
Board of Immigration Appeals

May 13, 1955

File: A-5085301

In re: Willia Niukkanen or William Niukkanen now known as William Albert Mackie.

In Deportation Proceedings In Behalf of Respondent: Nels Peterson, Esquire, Loyalty Building, Portland 4, Oregon.

Charges: Warrant: Act of 1918—Member of Communist Party of the United States after entry.

Lodged: None.

Application: Suspension of deportation—Section 244 (a) (5), IAN Act.

Detention Status: Released under $2000 bond.

This case comes forward on appeal from an order entered by the Special Inquiry Officer on February 16, 1955, denying the respondent's application requesting that his deportation be suspending under the provisions of Section 244 (a) (5), Immigration and Nationality Act of 1952, and directing that he be deported from the United States pursuant to law on the charge stated in the warrant of arrest. On examination of the record we find that the warrant for the respondent's arrest was issued and served upon him on June 17 and September 12, 1952, respectively.

This case first came before this Board on September 8, 1953, at which time we dismissed the appeal from an order entered by the Special Inquiry

Exhibit "A"—(Continued)

Officer on June 30, 1953, directing that respondent be deported from the United States pursuant to law on the charge stated in the warrant of arrest.

Thereafter, on November 29, 1954, we denied counsel's motion requesting that the proceedings be reopened for the purpose of affording respondent an opportunity to apply for suspension of deportation under the Immigration and Nationality Act of 1952. In our decision of November 29, 1954, we affirmed our previous finding that respondent had been a voluntary member of the Communist Party of the United States from 1937 to 1939 and commented that he did not testify on the issue of membership in the Communist Party during the hearing conducted on the warrant of arrest.

When this case was last before us on December 23, 1954, we directed the withdrawal of the outstanding order and warrant of deportation and further directed that the hearing be reopened for the purpose of affording respondent an opportunity to apply for and prosecute an application for suspension of deportation under the provisions of Section 244 (a) (5) of the Immigration and Nationality Act of 1952.

Respondent, a 46-year-old married male, native and citizen of Finland, has resided continuously in the United States since his admission for permanent residence at Sault Ste. Marie, Michigan, on September 5, 1909. Respondent was lawfully married to a native-born citizen of the United States on June 24, 1945, at Portland, Oregon.

Exhibit "A"—(Continued)

During the hearings conducted under the warrant of arrest on May 11 and May 21, 1953, two Government witnesses testified that the respondent was a voluntary member of the Communist Party of the United States from 1937 to 1939. These witnesses each testified that they had seen the respondent pay Communist Party dues. Likewise, testimony of the witness Wilmot revealed that the respondent attended closed meetings of the Communist Party in Portland, Oregon, and in Aberdeen, Washington. The record shows that the other Government witness Knipe testified untruthfully during the aforementioned hearing concerning his record of convictions, thereby lessening his credibility as a witness. However, testimony of the witness Knipe as to respondent's membership in the Communist Party, Portland Section, is corroborated by the Government witness Wilmot, who has been a credible and truthworthy witness in this proceeding.

The respondent did not testify during the aforementioned hearings on the issue of whether he had or had not been a member of the Communist Party of the United States. During the original hearings he was afforded an opportunity to make application for discretionary relief but failed to do so. The evidence of record clearly establishes that respondent is subject to deportation on the charge stated in the warrant issued for his arrest on June 17, 1952.

The respondent testified during the reopened

Exhibit "A"—(Continued)

hearings conducted at Portland, Oregon, on February 2 and 3, 1955, that he was a member of the Workers Alliance for approximately two years prior to his departure for Eastern Oregon during the year 1939. The Workers Alliance is an organization noted in the list prepared by the Attorney General, after appropriate investigation and determination, as a Communist Party affiliate. It was so designated as such on May 27, 1948, and the information with respect thereto was disseminated on June 1, 1948. (13 F.R. 3067.)

The respondent's citizen wife and his mother testified during the reopened hearing that they had never known or heard respondent talk about or discuss Communism. It is conceded that his deportation would result in serious economic detriment to his citizen spouse and her minor citizen child, issue of a prior marriage. Likewise, it is conceded that no evidence has been produced to show that the respondent has been a member of the Communist Party since leaving Portland, Oregon, for Eastern Oregon, during the year 1939. However, the testimony during the reopened hearing was evasive and unresponsive with respect to his activities both prior and subsequent to 1940. Under the applicable regulations the respondent has the burden of establishing that he meets the statutory requirements for the relief of suspension of deportation (8 CFR 242.54 (d)).

Respondent testified that he attended meetings in the Finnish Hall in the Albina section of Port-

Exhibit "A"—(Continued)

land, Oregon, but did not know whether they were Communist Party meetings or not and that perhaps there were Communists present at these meetings. When asked if there were Communists present, he answered "Maybe there were Communists there and maybe there wasn't." Notwithstanding the testimony of the two witnesses who appeared on behalf of the Government during the original hearing conducted under the warrant of arrest, and his own testimony in this proceeding that he was a member of the Workers Alliance, the respondent testified that he had never knowingly been a member of the Communist Party of the United States or of any branch, affiliate or organization of the Communist Party of the United States. He further testified that he did not knowingly at any time in his life become a member or affiliated with the Communist Party of the United States. When asked if he recalled who was present at the turkey dinner meeting of the Oregon Committee for the Protection of the Foreign Born, held in the Finn hall in November, 1954, he answered, "Do I have to answer that? * * * And make a person think I'm trying to act as a stool pigeon. That is one thing I don't want to do."

The remaining facts in this case have been heretofore fully covered by the Special Inquiry Officer and need no further discussion herein.

Counsel's assertion that there is no legal, reasonable or proper grounds for the Special Inquiry Officer's denial of respondent's application request-

Exhibit "A"—(Continued)

ing that his deportation be suspended under the provisions of Section 244 (a) (5) of the Immigration and Nationality Act of 1952, is without merit. The evidence of record clearly establishes that the respondent was a member of the Communist Party from 1937 until his departure from Portland, Oregon, to Eastern Oregon in 1939. During the reopened hearing he testified that he was a member of a group that was probably the Workers Alliance, an organization *designed* by the Attorney General of the United States as being Communist.

As hereinbefore stated, the respondent's testimony during the reopened hearing was evasive and unresponsive to most, if not all, of the questions asked of him with respect to the Communist Party and his being a member thereof. He refused to name the six, eight or maybe ten persons that were present at the Turkey Dinner meeting of the Oregon Committee for the Protection of Foreign Born held at the Finnish hall in November, 1954. While it has not been established that this latter organization is Communist or an affiliate of the Communist Party, the respondent steadfastly refused to name the persons that were present at that meeting. Likewise, the respondent failed to submit any evidence showing that he is actively opposed to the doctrines and teachings of the Communist Party. While the respondent's answers to questions concerning his activities both prior and subsequent to 1940 as well as the meetings attended by him are for the most part vague and unrespon-

Exhibit "A"—(Continued)

sive, it is noted that his recollection of places, persons and events prior to 1930 is good.

After carefully considering all the evidence of record together with the exceptions noted by counsel on appeal, we find nothing therein that warrants any change being made in the decision of the Special Inquiry Officer who has denied respondent's application requesting that his deportation be suspended under the provisions of Section 244 (a) (5), Immigration and Nationality Act, and has directed that he be deported from the United States pursuant to law on the charge stated in the warrant of arrest. The evidence of record, which is based primarily upon the testimony of the respondent, does not establish that he, the respondent, has completely severed his connection with the Communist Party of the United States and that he is no longer sympathetic to its aims or principles. There is an overwhelming amount of evidence to show that respondent was a member of the Communist Party of the United States from 1937 until early in the year 1939. There is nothing in the record to show that respondent has completely disassociated himself with the Communist Party and that he no longer believes in its doctrines or principles. For the reasons hereinbefore set forth, the following order will be entered.

Order: It is ordered that the appeal be dismissed.

Chairman.

[Endorsed]: Filed April 4, 1958.

[Title of District Court and Cause.]

WRIT OF HABEAS CORPUS

To: Ernest Hover, the above named respondent, Greeting:

We command you that you have the body of Willia Niukkanen, also known as William Niukkanen, also known as William Albert Mackie, by you imprisoned and detained, as it is alleged, together with the time and cause of such imprisonment and detention, before this Court, at the Courtroom thereof, in the United States Courthouse, in the City of Portland, County of Multnomah, and State of Oregon, on the 10th day of April, 1958, at the hour of 10:00 o'clock A.M., to do and receive that which shall then and there be considered concerning the said Willia Niukkanen, also known as William Niukkanen, also known as William Albert Mackie, and have you then and there this Writ.

Witness My hand this 4th day of April, 1958.

/s/ GUS J. SOLOMON,
United States District Judge.

[Endorsed]: Filed April 4, 1958.

[Title of District Court and Cause.]

RULE TO SHOW CAUSE

Upon consideration of the petition of Willia Niukkanen, also known as William Niukkanen, also known as William Albert Mackie, the Court

hereby orders the respondents to show cause why they should not be restrained from taking any action pursuant to the order of deportation of the petitioner and any warrant issued pursuant thereto, pending final determination by this Court of the above entitled action.

Pending the hearing upon this rule to show cause, it appearing to the Court that great and irreparable injury may be done the petitioner if any action is taken under said order and warrant of deportation, and it further appearing that respondents will in no wise be injured thereby, respondents are hereby stayed and restrained from taking any action on said order of warrant of deportation against petitioner.

This Rule to Show Cause is hereby made returnable before the Honorable Judges of the United States District Court for the District of Oregon, on the 16th day of April, 1958, at 10:00 o'clock A.M., in the United States Courthouse in the City of Portland, Oregon.

Dated This 4th day of April, 1958.

/s/ GUS J. SOLOMON,
United States District Judge.

[Endorsed]: Filed April 4, 1958.

[Title of District Court and Cause.]

MOTION

Comes Now Petitioner, by and through his attorneys Nels Peterson and Gerald H. Robinson,

and respectfully moves the Court for an Order requiring Respondents to produce into Court and make available for inspection by Petitioner and his counsel the complete report of the Federal Bureau of Investigation of the Department of Justice of the United States of America concerning petitioner's alleged affiliations with the Communist Party of the United States.

The foregoing motion is based upon Rule 34 of the Federal Rules of Civil Procedure and the rulings of the United States Supreme Court (especially the case of Jencks v. U. S.). The motion is also based upon the fact that the evidence produced at prior hearings with respect to Petitioner's alleged Communist associations resulted from various FBI investigations and reports, which Petitioner believes contain information, data, names of witnesses and reports which will tend to prove that Petitioner was not a member of the Communist Party so as to be a deportable alien. That unless such information is made available to Petitioner and his attorneys, Petitioner's substantive and procedural rights will be imperiled.

NELS PETERSON,
GERALD H. ROBINSON,
/s/ By GERALD H. ROBINSON,
Attorneys for Petitioner.

Affidavit of Mailing Attached.

[Endorsed]: Filed April 7, 1958.

[Title of District Court and Cause.]

RETURN TO THE RULE TO SHOW CAUSE AND PETITION FOR WRIT OF HABEAS CORPUS AND ANSWER TO COMPLAINT FOR INJUNCTIVE RELIEF TO PREVENT AGENCY ACTION

Comes now Respondent Ernest Hover, District Director, Immigration and Naturalization Service, United States Department of Justice, erroneously named by the Petitioner herein as "Officer in Charge, Immigration and Naturalization Service, at Portland, Oregon" by and through C. E. Luckey, United States Attorney for the District of Oregon, and for return to the petition for writ of habeas corpus and for answer to the complaint for injunctive relief to prevent agency action, admits, denies and alleges as follows:

1. Answering paragraphs I, II, VI, VII, VIII and XIX (XVIV) Respondent Ernest J. Hover admits the same.

2. Answering paragraph V Respondent Ernest J. Hover admits the same but alleges that the hearing referred to therein was valid in all respect and not a "purported" hearing as alleged therein.

3. Answering paragraphs XIII, XV, XVI, XVII, XVIII and XX Respondent Ernest J. Hover denies the same.

4. Answering paragraph III thereof Respondent

Ernest J. Hover alleges that he is the District Director of Immigration and Naturalization, Portland, Oregon, and a citizen of the United States and as such is in charge of the Office of the Immigration and Naturalization Service of the United States Department of Justice in the city of Portland, Oregon, but denies the remaining allegations of said paragraph III.

5. Answering paragraph IV thereof Respondent Ernest J. Hover admits that the Petitioner resides at 4326 North Montana Street, Portland, Oregon.

6. Answering paragraph IX thereof Respondent Ernest J. Hover admits that after December 16, 1957, Petitioner filed a motion for a new hearing with the United States Department of Justice, Board of Immigration Appeals, on the grounds that on the 9th day of December, 1957, the said Board of Immigration Appeals did render an opinion through its Chairman, Thomas G. Finucane, which decision states, among other things, as follows:

"It Is Ordered that the motion be and the same is hereby denied"; but said Respondent denies each and every other allegation contained therein.

7. Answering paragraph X thereof Respondent Ernest J. Hover admits that he has indicated his intention to cause the Petitioner to be taken into custody and be deported from the United States.

8. Answering paragraph XI thereof Respondent Ernest J. Hover admits Petitioner has ex-

hausted his administrative remedy but denies each and every other allegation contained therein.

9. Answering paragraph XII thereof Respondent Ernest J. Hover alleges that he will produce at the hearing in this cause the entire certified record of the proceedings before the said Louis C. Hafferman, Roy J. Norene and the Board of Immigration Appeals for review thereof by the Court.

And for a further and separate answer and defense comes now the Respondent Ernest J. Hover and alleges that the only new assertion after the disposition of the similar proceedings between the same parties or their predecessors in Civil No. 7833 in this district is that the subsequent decision of the United States Supreme Court in the case of Rowoldt v. Perfetto, 355 U.S. 115, which decision it is alleged so redefined the substantial and evidential requirements of membership in the Communist Party of the United States as to take petitioner out of a class of deportable aliens under the Immigration & Naturalization Act, has been decided.

2. That the same assertion was made before the Board of Immigration Appeals by the petitioner in his petition to the Board of Immigration of Appeals to reopen the case and the proceedings for reconsideration of the issue of deportability, which motion for reopening the Board of Immigration Appeals denied, reciting in the order denying the motion that "careful consideration of

the entire record revealed an overwhelming amount of evidence showing that the respondent was a member of the Communist Party of the United States from 1937 until early in the year 1939, and that such membership on his part was a meaningful association and one which was not wholly devoid of political implications. That this is the precise test of deportability laid down by the Supreme Court in the case of Rowoldt v. Perfetto, supra. In addition, eight days after considering that case, the Supreme Court refused to review the deportation case of this respondent. (Niukkanen v. Boyd, cert. den. 12/16/57; 2 L. Ed 2d 259)."

3. That said finding is based upon substantial evidence and was not arbitrary and capricious but in accordance with law and not contrary to the Constitutional rights, privileges and immunities of the petitioner.

Wherefore answering respondent having fully answered the allegations of the petition and complaint herein and having made a full and adequate return pursuant to the order of This Honorable Court, prays that the Petition for Writ of Habeas Corpus and the Complaint for Injunctive Relief to Prevent Agency Action herein be dismissed and held for nought and that the Rule to Show Cause heretofore issued by This Honorable Court be discharged and that the petitioner be remanded to the custody of Ernest J. Hover, District Director

of Immigration & Naturalization Service at Portland, Oregon, for deportation.

/s/ ERNEST J. HOVER,
District Director, U. S. Immigration & Naturalization Service Department of Justice.

/s/ C. E. LUCKEY,
United States Attorney for the District of Oregon.

Duly Verified.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed April 9, 1958.

[Title of District Court and Cause.]

MOTION THAT PETITIONER'S MOTION FOR ORDER REQUIRING PRODUCTION OF DOCUMENTS BE DENIED

Comes now the Respondent, Ernest J. Hover, District Director, Immigration and Naturalization Service, United States Department of Justice, erroneously named by the Petitioner as "Officer in Charge, Immigration and Naturalization Service, at Portland, Oregon" by and through C. E. Luckey, United States Attorney for the District of Oregon, and respectfully moves the Court that Petitioner's motion for an order requiring Respondent to produce into court and to make available for inspection by Petitioner and his counsel the complete report of the Federal Bureau of Investigation of the Department of Justice of the United States

of America concerning the Petitioner's alleged affiliations with the Communist Party of the United States be denied because:

1. The record of agency actions challenged herein and the record before the special inquiry officer and before the Board of Immigration Appeals certified herein and before this Court contains no reference to any information from reports of the Federal Bureau of Investigation with the exception of the inquiry of the Federal Bureau of Investigation and the report of that agency concerning any prior criminal record of the Petitioner which inquiry and report are exhibits in the file and contained therein and the validity of the proceedings stands on the record contained in such file and therefore said records of the Federal Bureau of Investigation, if any, are irrelevant and incompetent in this proceeding.

2. Said records, if any, are not admissible in this proceeding. No witness in these proceedings before the special inquiry officer nor the Board of Immigration Appeals is claimed to have nor was asked if he had made any statement to any FBI agent or report to the FBI during the proceedings. The Petitioner is not entitled to rummage at will through the files of the Federal Bureau of Investigation. Petitioner is not entitled to investigative data, information, names of witnesses, etc., if any, of the Federal Bureau of Investigation.

3. Such motion is not timely there being no basis therefor based upon the administrative pro-

ceedings and no request or demand having been made therefor during the pendency of such proceedings.

Respectfully submitted,

/s/ C. E. LUCKEY,
United States Attorney.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed April 9, 1958.

[Title of District Court and Cause.]

MOTION FOR SUMMARY JUDGMENT

Comes now the respondent, Ernest J. Hover, District Director, Immigration and Naturalization Service, United States Department of Justice, erroneously named herein as "Officer in Charge, Immigration and Naturalization Service Office, United States Department of Justice at Portland, Oregon", and respectfully moves the above-entitled Court for summary judgment of dismissal of petitioner's Petition for Writ of Habeas Corpus and the Complaint for Injunctive Relief to Prevent Agency Action under Rule 56 of the Federal Rules of Civil Procedure on the grounds that the pleadings and the certified copy of the Immigration and Naturalization file tendered into Court herein show that the respondent is entitled to judgment as a matter of law in that the record of deportation proceedings shows that the petitioner has been accorded a full and fair hearing according to law

on the issue of his deportability, the issue now before the Court, and that said records demonstrate that the Petition for Writ of Habeas Corpus should be denied and the Complaint for Injunctive Relief to Prevent Agency Action and the cause herein set forth should be dismissed as a matter of law.

/s/ C. E. LUCKEY,
United States Attorney for the
District of Oregon.

Memorandum In Support of Motion
For Summary Judgment

1. Summary Judgment is appropriate where the only evidence for consideration is the record before the Immigration and Naturalization Service and the Board of Immigration Appeals for the Attorney General, which officials took the administrative action complained of by the petitioner. Chow v. Shaughnessy and Louie v. Shaughnessy, 151 F. Supp. 23 (S.D. N.Y., 1957). Gongalvez-Rosa v. Shaughnessy, 151 F. Supp. 906 (S.D. N.Y., 1957). Diogi v. Zimmerman, E.D. Penn. No. 16680, Civil, 1956.

2. The scope of judicial review is limited. U. S. ex rel Adel v. Shaughnessy, 183 F. 2d 371. (2 Cir., 1950). Fougerouse v. Boyd, et al., USDC, Oregon, Civil Nos. 7328 and 7331, decided January 27, 1958.

/s/ C. E. LUCKEY,
United States Attorney.

Affidavit of Service by Mail Attached.
[Endorsed]: Filed April 9, 1958.

In the United States District Court
for the District of Oregon

Civil No. 9741

WILLIA NIUKKANEN, also known as WILLIAM NIUKKANEN, also known as WILLIAM ALBERT MACKIE, Petitioner,

vs.

JOHN P. BOYD, District Director, Immigration and Naturalization Service, United States Department of Justice, and ERNEST HOVER, Officer in Charge, Immigration and Naturalization Service Office, United States Department of Justice, at Portland, Oregon,

Respondents.

ORDER

This matter came on for hearing April 10, 1958, upon the petition for writ of habeas corpus and complaint for injunctive relief to prevent agency action. The Court having heard the arguments of counsel and considered the evidence introduced and being fully advised in the premises it is

Ordered:

1. That the petition for writ of habeas corpus and complaint for injunctive relief to prevent agency action is hereby dismissed on the merits.

2. That the writ of habeas corpus heretofore issued is hereby discharged.

3. That the petitioner is hereby remanded to the

custody of Ernest Hover, District Director of the United States Department of Justice, Immigration and Naturalization Service, Portland, Oregon, to be held for deportation pursuant to the warrant and order of deportation previously issued.

Dated at Portland, Oregon, this 14th day of April, 1958.

/s/ GUS J. SOLOMON,
Judge.

[Endorsed]: Filed April 14, 1958.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Willia Niukkanen, also known as William Niukkanen, also known as William Albert Mackie, petitioner in the above entitled cause, hereby gives Notice of Appeal to the United States Court of Appeals for the Ninth Circuit from a certain order made on the 14th day of April, 1958, by the Honorable Gus J. Solomon, Judge of the United States District Court for the District of Oregon, dismissing petitioner's petition for a writ of Habeas Corpus and Injunctive Relief, discharging the Writ of Habeas Corpus theretofore issued, and remanding petitioner to Ernest Hover, District Director, Immigration and Naturalization Service, United States Department of Justice, Portland, Oregon, for deportation to Finland, pursuant to the Warrant of Arrest and Order of Deportation of said Service.

Dated this 10th day of April, 1958.

PETERSON, POZZI & LENT,
NELS PETERSON and
GERALD H. ROBINSON,
/s/ By NELS PETERSON,
Attorneys for Petitioner.

Acknowledgment of Service Attached.

[Endorsed]: Filed April 14, 1958.

[Title of District Court and Cause.]

BOND FOR COSTS ON APPEAL

Whereas, Willia Niukkanen, also known as William Niukkanen, also known as William Albert Mackie, petitioner in the above entitled suit, appeals to the United States Court of Appeals for the Ninth Circuit from an order dismissing petitioner's petition for Writ of Habeas Corpus and Injunctive Relief, discharging the Writ of Habeas Corpus theretofore issued, and remanding petitioner to Ernest Hover, District Director, Immigration and Naturalization Service, United States Department of Justice, Portland, Oregon, for deportation to Finland, pursuant to the Warrant of Arrest and Order of Deportation of said Service, entered on the 14th day of April, 1958, by Gus J. Solomon, Judge of the United States District Court for the District of Oregon, and from the whole thereof.

Now, Therefore, in consideration of the premises, and of such appeal, we, Willia Niukkanen, also

known as William Niukkanen, also known as William Albert Mackie, as principal, and the Fidelity and Deposit Company of Maryland, a corporation organized under the laws of the State of Maryland and duly authorized to transact a surety business in the State of Oregon, as surety, do hereby jointly and severally undertake and promise on the part of said petitioner, Willia Niukkanen, also known as William Niukkanen, also known as William Albert Mackie, that said petitioner will pay all court costs and disbursements which may be awarded against him on said appeal, but not to exceed the sum of Two Hundred Fifty and no/100 ($250.00) Dollars.

Dated this 10th day of April, 1958.

/s/ WILLIA NIUKKANEN,
/s/ WILLIAM NIUKKANEN,
/s/ WILLIAM ALBERT MACKIE,
Principal.

[Seal] FIDELITY AND DEPOSIT COMPANY OF MARYLAND,
/s/ By VANCE McKENNEY,
Attorney-in-Fact and Resident Agent,
Surety.

Acknowledgment of Service Attached.

[Endorsed]: Filed April 14, 1958.

[Title of District Court and Cause.]

AFFIDAVIT

State of Oregon,
County of Multnomah—ss.

I, Gordon Griffiths, being first duly sworn on oath, depose and say:

That I am an official Court reporter for the United States District Court for the District of Oregon; that I reported the proceedings in Willia Niukkanen, etc., vs. John P. Boyd, et al., civil number 9,741 in the aforesaid Court; that because of previous commitments for the production of transcripts of testimony in earlier cases, which cases have been given priority by the United States District Court, I am unable to complete the transcript in the aforesaid case prior to the middle of June, 1958, that is approximately June 15, 1958.

/s/ GORDON GRIFFITHS.

Subscribed and sworn to before me this 19th day of May, 1958.

[Seal] /s/ GERALD H. ROBINSON,
Notary Public for Oregon. My Commission expires 3-3-61.

[Endorsed]: Filed May 20, 1958.

[Title of District Court and Cause.]

ORDER

Upon motion of plaintiff and good cause appearing therefor,

It Is Hereby Ordered that the time in which petitioner-appellant may docket his appeal in the United States Court of Appeals for the Ninth Circuit is hereby extended to and including the 26th day of May, 1958.

Dated this 19th day of May, 1958.

/s/ GUS J. SOLOMON,
U. S. District Court Judge.

[Endorsed]: Filed May 20, 1958.

[Title of District Court and Cause.]

STIPULATION

It Is Hereby Stipulated and Agreed by and between Gerald H. Robinson, of counsel for petitioner, and C. E. Luckey, United States Attorney, of counsel for respondents, that the original exhibits admitted into evidence at the hearing in the above entitled cause be transmitted by the Clerk of this Court to the United States Court of Appeals for the Ninth Circuit.

Dated this 19th day of May, 1958.

/s/ GERALD H. ROBINSON,
Of Counsel for Petitioner.

/s/ C. E. LUCKEY,

Of Counsel for Respondent,
Ernest J. Hover.

[Endorsed]: Filed May 20, 1958.

[Title of District Court and Cause.]

ORDER

On motion of petitioner, supported by stipulation between attorney for petitioner and the United States Attorney, and it appearing to the Court that there is good cause therefor:

It Is Hereby Ordered that the original exhibits admitted into evidence at the hearing in the above entitled case be transmitted to the United States Court of Appeals for the Ninth Circuit by the Clerk of this Court.

Dated this 19th day of May, 1958.

/s/ GUS J. SOLOMON,
United States District Judge.

[Endorsed]: Filed May 20, 1958.

[Title of District Court and Cause.]

DOCKET ENTRIES

1958

Apr. 4—Filed Petition for Writ of Habeas Corpus and Complaint for Injunctive Relief (No Summons Issued).

Apr. 4—Filed Writ of Habeas Corpus, fixing date of April 10, 1958, at 10:00 a.m.

1958

Apr. 4—Filed Rule to Show Cause, fixing hearing April 10, 1958, at 10:00 a.m.

Apr. 7—Filed Petitioner's Motion to require respondents to produce record for inspection.

Apr. 9—Filed respondents' Motion for Summary Judgment.

Apr. 9—Filed respondents' Return to Rule to Show Cause and Petition for Writ of Habeas Corpus and Answer to complaint for Injunctive relief to prevent agency action.

Apr. 9—Filed respondents' Motion that Petitioner's Motion for Order Requiring Production of Documents be denied.

Apr. 10—Record of hearing on Order to Show Cause why defts. should not be restrained from deporting petitioner; evidence adduced; Record of hearing upon Motion of Petitioner to require United States to produce records; Entered Order denying Motion to produce records; Record of hearing upon motion to require United States to produce witnesses; Entered Order denying Motion to produce witnesses; Record of Oral motion to quash order of deportation, etc.; Entered Order denying Motion to quash order of deportation File of Immigration Office received in evidence.

1958

Apr. 14—Record of hearing on entry of judgment order.

Apr. 14—Filed and entered order dismissing petition for writ of habeas corpus and dismissing complaint for injunctive relief; Order discharging writ heretofore issued and remanding petitioner to custody of Immigration and Naturalization Service.

Apr. 14—Filed Notice of Appeal by plaintiff (served).

Apr. 14—Filed Bond for costs on appeal.

Apr. 16—Filed Partial Transcript of Proceedings.

Apr. 24—Filed and Entered Order Staying Deportation and setting bail in sum $2,000.00 (Court of Appeals).

Apr. 25—Filed Designation of Record on Appeal by appellant.

Apr. 25—Mailed Bond to Stay Deportation to Court of Appeals.

Apr. 28—Filed appellee's designation of additional record on appeal.

Apr. 30—Filed appellant's amended designation of record on appeal.

May 20—Filed affidavit of Gordon Griffiths re time for docketing appeal.

May 20—Filed and entered order extending time to May 26, 1958 to docket appeal.

May 20—Filed stipulation re transmittal of exhibits to Court of Appeals.

May 20—Filed and entered order to forward exhibits to Court of Appeals.

1958

May 21—Filed reporter's transcript of proceedings of April 10 and 14, 1958 (in duplicate).

May 22—Mailed record to Court of Appeals, including reporter's transcript and Exhibit 1.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
District of Oregon—ss.

I, R. DeMott, Clerk of the United States District Court for the District of Oregon, do hereby certify that the foregoing documents consisting of Petition for writ of habeas corpus and complaint for injunctive relief to prevent agency action; Writ of habeas corpus; Rule to show cause; Motion by petitioner to require respondents to produce Federal Bureau of Investigation reports; Return to the rule to show cause, etc.; Motion that petitioner's motion for order requiring production of documents be denied; Respondents' motion for summary judgment with memorandum attached; Judgment order; Notice of appeal; Bond for costs on appeal; Designation of record on appeal by appellant; Designation of additional record on appeal by appellees; Amended designation of record on appeal by appellant; Affidavit of Gordon Griffiths, Court Reporter re extension of time; Order allowing appellant to and including May 26, 1958 to docket appeal; Stipulation re forwarding exhibits to Court of Appeals; Order to

transmit exhibits to Court of Appeals; and Transcript of docket entries constitute the record on appeal from a judgment of said Court in a cause therein numbered Civil 9741, in which Willia Niukkanen, etc. is the petitioner and appellant and John P. Boyd, District Director, Immigration and Naturalization Service, United States Department of Justice, et al. are the respondents and appellees; that the said record has been prepared by me in accordance with the designations of contents of record on appeal filed by the appellant and appellees, and in accordance with the rules of this court.

I further certify that there is enclosed herewith Exhibit No. 1, and the reporter's transcript of proceedings of April 10 and 14, 1958. The bond to stay deportation was mailed to the Court of Appeals on April 25, 1958.

I further certify that the cost of filing the notice of appeal, $5.00 has been paid by the appellant.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said court in Portland, in said District this 22nd day of May, 1958.

[Seal] R. DE MOTT,
Clerk,

/s/ By THORA LUND,
Deputy.

United States District Court
District of Oregon

Civil No. 9741

WILLIA NIUKKANEN, also known as WILLIAM NIUKKANEN, also known as WILLIAM ALBERT MACKIE, Petitioner,

vs.

JOHN P. BOYD, District Director, Immigration and Naturalization Service, United States Department of Justice, and ERNEST HOVER, Officer in Charge, Immigration and Naturalization Service Office, United States Department of Justice, at Portland, Oregon, Respondent.

TRANSCRIPT OF PROCEEDINGS

Portland, Oregon, April 10, 1958, 10:00 a.m.

Before: Honorable Gus J. Solomon, District Judge.

Appearances: Mr. Frank Pozzi and Mr. Gerald H. Robinson, of Attorneys for Petitioner; Mr. C. E. Luckey, United States District Attorney, appearing in behalf of the Respondents.

Court Reporter: Mr. Gordon R. Griffiths. [1]*

The Court: We will hear the case of Niukkanen vs. Boyd.

Mr. Robinson: Your Honor, I have served on me this morning by mail a motion that the Petitioner's

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* Page numbers appearing at top of page of Reporter's Transcript of Record.

motion, that an order requiring the production of certain documents of the FBI filed in this case be denied. I am not sure what the effect of this motion, subpoena and motion is, and I assume the Court will want to discuss these preliminaries first.

The Court: Go ahead. What is the theory of your case here?

Mr. Robinson: The theory of the case or the motion?

The Court: Of the case.

Mr. Robinson: Of the case; the situation is this, your Honor: The Petitioner in 1952 was arrested on an order and warrant of deportation after hearings were held in connection with the allegation that during the years 1937, 1938 and 1939 he was a member of the Communist Party, and as an alien he was therefore subject to deportation. The hearing was affirmed; the results of this hearing were affirmed by the Board of Immigration Appeals, and application for suspension of deportation was denied, and this was also affirmed by the Board of Immigration Appeals, and a couple of years ago the Petitioner filed a petition for writ of habeas corpus in this court, which your Honor heard. The petition was denied, and the case has been appealed to the United States Court of Appeals, where it [2] was affirmed, and to the United States Supreme Court, where certiorari was denied last December.

Between the time of this Court's judgment and, as a matter of fact, between the time of the Court of Appeals' judgment and the denial of certiorari, the United States Supreme Court handed down its

decision in the case of Rowoldt vs. Perfetto which, we believe, substantially re-defines both the evidential and substantive requirements of proof of sufficient meaningful association of an alien with the Communist Party to make him deportable, and we have applied for a new hearing.

The Court: Where?

Mr. Robinson: With the Board of Immigration Appeals. This was timely filed. As soon as the Supreme Court's action in denying our petition for a writ was received, we filed this motion with the Board of Immigration Appeals. Thereafter, the Board of Immigration Appeals refused to give us a new hearing on this issue, and the Petitioner was then notified to report for deportation. We have filed this writ, and the day after we filed this writ we have filed a motion to require the Government to produce the FBI report in this case, and we are particularly interested in those made by the two witnesses who testified against the Petitioner at the hearings in this case, Robert Wilmot and a Lee Knipe. These two witnesses are the only witnesses which the Government produced at that [3] original hearing, and it is our contention that under the circumstances the Petitioner is entitled to hear whatever reports these people made to the FBI, to impeach their testimony as given at those original hearings, and also for the use in developing the Petitioner's association with the Communist Party, if it be proved and if it be granted, for the sake of argument, was not of the meaningful variety and did not——

The Court: The Petitioner denied that he ever was a member of the Communist Party.

Mr. Robinson: That's right; and in the alternative we have made that contention, that if the Government's evidence be taken at face value, nevertheless it does not indicate the type of meaningful association that is required by the Rowoldt case.

The Court: I do not understand the theory upon which you are coming in. In other words, does the law provide that a new hearing should be held, or are you trying this case on the record that was made?

Mr. Robinson: We believe that the law requires that a new hearing should be held.

The Court: Give me a case.

Mr. Robinson: We found no authority.

The Court: I read the Rowoldt case. It is not in point on this, and another thing: Two weeks before this certiorari [4] was denied in this case the Rowoldt decision came down. The Supreme Court knew about the Rowoldt case.

Mr. Robinson: It is my understanding, your Honor, that the denial of certiorari is not a ruling on the merits of the case; that it can be denied for a great many reasons, and one of them may have been that the Supreme Court believed that this case should be handled at the administrative level, the Board of Immigration Appeals.

The Court: They didn't say so, did they?

Mr. Robinson: No, but that would logically follow.

The Court: This is a petition for habeas corpus

on the ground of capricious action on the part of the Board?

Mr. Robinson: That is true.

The Court: Mr. Wilmot and Mr. Knipe testified some three or four years ago. Under the Jencks case—and I have interpreted the Jencks case more broadly than any other District Judge in America—there is no provision for the taking of testimony.

Mr. Robinson: I read your opinion, your Honor.

The Court: Yes; and this case goes far beyond anything that I ever decided. In the conscientious objector case I required the Government to bring in the evidence, and I dismissed the case because they refused to do it.

Mr. Robinson: Yes, I understand.

The Court: But in this case three years after [5] the man testifies you are asking that the Government produce evidence.

Mr. Robinson: Well, the Jencks case was not decided at the time of the hearing. There was no—the rule at the time of this hearing was completely different, and the counsel that handled it at that time exercised his full rights that were known to him.

The Court: I don't think that is true. I don't think that the Jencks case by the Supreme Court changed this very much. We have always required in this court where this man had his hearings that whenever the Government produced a witness who had made a written statement that statement was available to counsel for defendant for the purposes of impeachment. This is not a different rule. Mackie had every remedy available to him all the time in

this court, and just because he did not exercise it, now all these years later he cannot come in and ask for it.

Mr. Robinson: There is one further point that impinges on that situation, your Honor, though, and that is that the Rowoldt case laid down new law on the criterion for membership in the Communist Party as a basis of deportation. I am sure that your Honor is familiar with the case. Rowoldt himself admitted that he was a member.

The Court: Yes, he came in clean. He came into court and testified that he had been a member of the Communist Party. [6]

Mr. Robinson: That's right.

The Court: And had done all these things. Now, Mackie was offered the same opportunity of admitting membership and coming under the same rule on the ten-year period that he had not participated. He refused that offer.

Mr. Robinson: The Rowoldt case was not on suspension of deportation, your Honor. It was on the question of membership as a basis of party——

The Court: I am going to deny your motion that the Government produce those reports until and unless the Government offers these witnesses at this hearing.

Mr. Robinson: Well, then, we would make one further motion in connection with that. May I make one point before we make this motion, your Honor, that you have indicated that Mr. Mackie could have come in and admitted membership in the Communist Party. We know that he could have, but he did

not because he was not a member. He did not care to lie under oath that he was. He was offered by the Immigration people leniency and clemency if he would testify the way they wanted him to.

The Court: Well, that does not show in the record, and there is nothing like that. I have read the entire record over here, but I want to say this, that therein is the big distinction between Rowoldt and Mackie.

Mr. Robinson: I don't think it is, your Honor. Rowoldt [7] is a stronger case for deportation than Mr. Mackie because it seems to me, in reading the Rowoldt case, that the essence of the Court's opinion is that mere membership is not sufficient for deportation; that it requires what the Court—the Court uses the words "meaningful association."

The Court: I read the case. The motion is denied. Put on your witness. I am going to let you do one thing. I do not think you are entitled to put on any evidence, but I am going to permit you to put Mr. Mackie on.

Mr. Robinson: I have a couple more motions, if I may, at this time, your Honor?

The Court: All right; go ahead.

Mr. Robinson: First, in view of the Court's ruling on our motion to produce the FBI report, we would like to lay a foundation, and so, therefore, we move that the Government be required to bring Mr. Wilmot and Mr. Knipe into court to testify as to whether or not they made FBI reports and be subject to cross examination with respect to them.

The Court: The motion is denied.

Mr. Robinson: Then, further, your Honor, we would move that the warrant of deportation be quashed and that this writ, petition, be granted.

The Court: The motion is denied.

Mr. Robinson: May I state my grounds for the record?

The Court: You can state your grounds at a subsequent [8] time.

Mr. Robinson: Very well.

The Court: I will let you make your full record. Call your witness.

WILLIAM ALBERT MACKIE

Petitioner, called in his own behalf, having been first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Robinson): Would you state your name, please? A. William Albert Mackie.

Q. Are you also known by other names?

A. No, I am not.

Q. Are you—*in* your name in Finnish Willia Niukkanen? A. Yes.

Q. You are generally known in this country as William Mackie; is that correct? A. Yes.

Q. Where do you live, Mr. Mackie?

A. 4326 North Montana.

Q. How long have you lived there? [9]

A. Oh, 12 years, 13 years.

Q. Where did you live before that?

A. 3820 North Gantenbein.

Q. How long did you live there?

(Testimony of William Albert Mackie.)

A. Oh, 14 years.

Q. How long have you been a resident of the State of Oregon? A. Oh, 37 years.

Q. Do you have parents and family living in Portland? A. One, my father, is living.

Q. And your mother?

A. She died about a year ago, year and a half.

Q. Is your father—how old is your father?

A. 79.

Q. Is he employed? A. Yes.

Q. In what capacity?

A. He is a tailor.

Q. How long does he work?

A. Well, he works the full week.

The Court: Mr. Robinson, all of this is in his testimony for mitigation and for suspension. Now, I thought you had something that pertained to the Rowoldt case.

Mr. Robinson: I am getting to it, your Honor.

Q. Mr. Mackie, are you a citizen of the United States? A. No. [10]

Q. When did you come to the United States?

A. 1909.

Q. Have you been living in this country continuously since that time? A. Yes.

Q. Since your entry into the United States have you or have you not ever been a member of the Communist Party of the United States?

A. No.

Q. Have you been arrested on a warrant of deportation? A. Yes.

(Testimony of William Albert Mackie.)

Q. Subsequent to that warrant, did you attend a hearing on the issue of whether or not you were a member of the Communist Party of the United States held by the Immigration Service?

A. I don't understand the question.

Q. Did you attend a hearing? A. Yes.

Q. Before the Immigration Service; is that it?

A. Yes, sir.

Q. Very well. Was one of the witnesses at that hearing a man named Wilmot? A. Yes.

Q. You were present during his testimony at that time? A. I was.

Q. At that hearing, on Page 13 of the transcript of that [11] hearing, Mr. Wilmot was asked whether or not he knew you, and he testified that he did know you. Mr. Mackie, had you ever seen Robert Wilmot prior to that hearing?

A. I never saw him. I don't know the man.

Q. Have you ever seen him since that hearing?

A. No.

Q. On Page 14 of that hearing Mr. Wilmot testified that he met you at the home of a person named Helme Burns, who was the Secretary of the Labor New Dealer, which was a newspaper published in Portland, Oregon, during the '30's. Do you know a person named Helme Burns?

A. Yes, I know a lady by that name.

Q. Did you ever meet, did you ever meet a Robert Wilmot at the home of Helme Burns?

A. No.

Q. At any time? A. No.

(Testimony of William Albert Mackie.)

Mr. Luckey: If your Honor please, this is all the same testimony that has been in the record before.

The Court: Yes; I think the record shows that he never met Mr. Wilmot, that he belonged to no other organization except the Teamsters Union, the Epworth League, and the Boy Scouts, and that he didn't belong to the Communist Party. At one time he said he never knowingly belonged to the Communist Party. The testimony also shows that he knew Mr. Lee Knipe very slightly [12] and that he didn't recall very well whether he had ever been a member of the Workers Alliance, but, subsequently, on cross examination he had a vague recollection of belonging to the Workers Alliance prior to the time that he went down to Astoria. He has brought all that out already.

Q. (By Mr. Robinson): Mr. Mackie, are you familiar with the political theories of the Communist Party as they were taught in the years 1937 to 1939? A. No.

Q. Have you ever read any books about Communism? A. No, I have not.

The Court: He has already covered that in his petition for suspension.

Mr. Robinson: Well, not in very great detail, your Honor. The point is, your Honor, that when these hearings were held, the rule in the Rowoldt case and standard set forth in the Rowoldt case had never been promulgated, and that is why we asked for a new hearing on this matter so that the evi-

(Testimony of William Albert Mackie.)

dence could be brought in as to on what basis, if any, Mr. Mackie had a meaningful association with the Communist Party.

The Court: Mr. Mackie has denied he was ever a member of the Communist Party, and if that is true, then he should not be deported.

Mr. Robinson: I grant that. It is very true, your Honor; that's very true. [13]

Q. Mr. Mackie, at the time you were arrested with this warrant of deportation, did you, pursuant to that warrant and the instructions of the Immigration Department, report to the Immigration Officers in this building?

A. I did that morning, the following morning.

Q. The following morning? A. Yes, sir.

Q. Did you there have a conversation with one of the Immigration Officials? A. I did.

Q. Who was he? A. Mr. Fenn.

Q. Mr. Fenn? A. Yes.

Q. Do you know his position?

A. Well, he brought the warrant out. He was a prosecutor for the case.

Q. At that conversation with Mr. Fenn did he indicate to you or offer you any leniency if you would cooperate with the Government?

A. He tried to make a deal with me.

Q. Would you tell us what he told you?

A. He said, "I think you know some information we would like to have." He said if I would cooperate and give it to them, well, he made the mention he would let me off easy. [14]

(Testimony of William Albert Mackie.)

Q. What did you tell him?

A. I said I didn't know anything.

Q. Prior to the hearing on your petition for suspension of deportation was there a conversation held between you, your attorney, between you and the hearing officer? A. Yes.

Q. This was immediately prior to the hearing; is that correct? A. Yes.

Q. What was the substance of that conversation?

The Court: What does this issue go to?

Mr. Robinson: This issue goes to the contention, your Honor, that Mr. Mackie was offered a deal here, but because he didn't care to lie as to his associations and go out and testify against other people to incriminate——

The Court: I have read that. He said he didn't want to be a stool-pigeon.

Mr. Robinson: Yes, but that is not the same testimony.

The Court: How does that go to prove or disprove that in 1938, 1939 and 1940 he had a meaningful association with the Communist Party? What possible connection would that have, a statement that he was offered in the '50's if——

Mr. Pozzi: May it please the Court, your Honor, this is the way we believe it was. Bill Mackie would be a fool, and we have so advised him, to say he was not if he were because he would not be here in this courtroom today, not if he had [15] said he was. He understands that. All he has to do is say Yes,

(Testimony of William Albert Mackie.)

but it would be a lie, and so he has chosen not to lie about it either to the Immigration Board lawyers or in this courtroom. This is what it means, then: He had no meaningful association in 1937, 1938 or '9 because he knew no one connected with them. He didn't know this fellow Wilmot that they brought out from New York, a mystery writer, never saw him before in his life. Your Honor, this man does not deserve to be deported on any grounds, and this evidence goes to show lack of meaningful association by inference. That is all we are trying to show.

The Court: You mean that in 1950 a prosecutor said to him that, "If you say that you are a member of the Communist Party we won't deport you;" that that will go to show that he didn't have any meaningful association in 1939?

Mr. Pozzi: The only inference you could draw from his refusal to say he was when he was not is that he must not have had a meaningful association because it is perfectly obvious that the man has been advised as to his rights either way. He knows through his attorneys what the Immigration Service has done in other cases, what the other agency—one other agency has done. He has been advised about those things. The man would have to be a blithering idiot, your Honor, to do otherwise.

The Court: Well, I don't believe that. Mr. Pozzi, I [16] have told you, and I have told a lot of other people I do not like the McCarran-Walter Act. I think it is a terrible Act. If I were in the

(Testimony of William Albert Mackie.)

Congress of the United States, I would have voted against it. If I had been President, I would have vetoed the bill because I think it is outrageous that a man who is brought into the United States at the age of 10 months old or one year and who has lived here all his life should be deported. I do not believe that. I do not believe that we ought to send people back to Italy who become gangsters in the United States. I do not believe in those laws; but when the President of the United States appointed me to this position he did not tell me that I could change the laws. He told me that I have to enforce those laws that are on the books, and that is all I have to do.

Now, I am very unsympathetic with this law, but I have got to administer the law, and I have got to call them down the center, and I do it for everybody, not only for the Government or for the defendants, but everyone; and because I am unsympathetic with a law does not mean that I am going to disregard the reach of the law.

Mr. Pozzi: We understand the Court's feelings in the matter, your Honor, but we do feel that this case—at least there is an inference——

The Court: I am going to let you put on your testimony even though I do not think it is admissible. I want to say I [17] do not believe any of this testimony is admissible, but I am going to let it come in because I want to see that he is able to protect his record.

Q. (By Mr. Robinson): Mr. Mackie, in 1937 to 1939 were you a member of any political party?

(Testimony of William Albert Mackie.)

A. No, I wasn't.

Q. You were not a registered voter because you were an alien; is that correct?

A. That's right.

Q. Have you had any political sympathies, sympathies with a political party; were you sympathetic?

A. Well, at the time the Democrats.

Q. Did you have what might be called a political philosophy in 1937 to 1939?

A. No, I didn't.

Q. Do you know what a political philosophy is?

A. I think I could guess, yes.

Q. What is your understanding of that term?

A. I wouldn't know how to explain it. I suppose a fellow should — your ideas in a certain line of thought, what you think is right in certain politics.

Q. It is your testimony that you didn't have any particular political philosophy during this period?

A. No, I didn't.

Q. Is that correct? [18] A. That's right.

Q. Mr. Mackie, what is your opinion of a revolution such as occurred in Russia when the Communists obtained power? Do you know what that question means?

A. Well, I don't know exactly what you would— you mean what I think of it?

Q. That's right.

A. Well, no revolution is very nice. It is a lot of bloodshed and hardship for everybody.

Q. What is your opinion as to whether Commu-

(Testimony of William Albert Mackie.)

nism was the cause or outgrowth of the Russian Revolution? A. I wouldn't know.

Q. What is your personal belief as to the principles of Communism? In other words, what are the principles of Communism?

A. Well, I wouldn't know that either.

The Court: In fact, you don't know anything about Communism, do you?

The Witness: Very little.

Q. (By Mr. Robinson): Did you know anything in 1938 and 1939?

A. No, I—well, I have heard them talk about it, but I don't know very much about it.

Q. What was your impression of what the Communist Party was trying to do? [19]

A. Well, the only thing I heard in those days was more relief and more work, and I never heard anything else; no violent overthrow of the Government, or anything of that sort, but anyplace I went to meetings was always more work and more food.

Q. As far as you know, that was what the Communist Party stood for during that period?

A. I don't know if they stood for that, but I never heard anything against it.

Q. Mr. Mackie, do you know what a plenum is?

A. No, I don't.

Q. Do you know what that word means?

A. Well, I should know what the word means, but I really don't know.

Q. Have you heard of the term plenum used in connection with the Communist Party?

(Testimony of William Albert Mackie.)

A. Oh, I probably read it in the papers at one time or other.

Q. Have you ever attended a plenum of the Communist Party? A. No, I have not.

Q. Or any part thereof? A. No.

The Court: I think you have made your record here. The man says he is not a member of the Communist Party and doesn't [20] know anything about the Communist Party, doesn't know Louis Olson, Rappaport or Murphy. I have read the record. He doesn't know anybody who was active here in the Communist Party during 1937, '38 and '39.

Mr. Robinson: Except Knipe.

The Court: Did you know Rappaport?

The Witness: No, I didn't.

The Court: What were you doing in 1938, '39 and '40?

The Witness: In 1939 I drove a truck on construction, road construction, and '40, and '38 I think I worked for the U. S. Engineers.

The Court: What about '37?

The Witness: I don't think I did much of anything. There wasn't too much work to be got. I just did what I could find to do.

The Court: In 1937 I think you indicated that you had for a short time been a member of the Workers Alliance?

The Witness: Yes, sir.

The Court: Then you went down to Astoria?

The Witness: Yes, sir.

(Testimony of William Albert Mackie.)

The Court: What did you do in Astoria?

The Witness: I worked on construction, road construction, Eastern Oregon and Astoria.

The Court: I think I made a mistake. You know Louis Olson, don't you? [21]

The Witness: Right now, offhand, I don't know him.

The Court: I thought you said in your statement that you knew Louis Olson.

The Witness: I don't remember the name of the man.

The Court: I thought you said you knew him and his mother.

The Witness: I know Lena Olson now since this trouble came up.

The Court: Lena?

The Witness: Yes.

The Court: That is not his wife, is it?

The Witness: Probably—he is about 79 years old, 75.

The Court: But you didn't know that he had once been an organizer for the Communist Party.

The Witness: No, I didn't.

The Court: You found that out later?

The Witness: I didn't find that out either, no.

The Court: All right; go ahead.

Q. (By Mr. Robinson): Are you employed now?

A. Yes.

Q. What is your employment?

A. I am a painter.

(Testimony of William Albert Mackie.)

Q. Are you employed by someone else or self-employed? A. I am self-employed. [22]

Q. In other words, you are a painting contractor; is that the correct term? A. Yes.

Q. This has been your business or profession for some time, hasn't it? A. Yes, it has.

Q. For how long?

A. Five years anyway.

Q. I see. A. For myself.

Q. Are you presently contributing any support to your father at this time?

A. Right now I am not, no.

Q. I see.

A. I pick him up, bring him to work.

Q. What is the state of your father's health at the present time? A. It is very poor.

Q. Has it changed since the hearing in this case?

The Court: Mr. Robinson, I think that this is way beyond the issues of the case.

That was proper on the petition for suspension, and you went into that in great detail.

Mr. Robinson: I am trying to bring the record up to date, your Honor. [23]

The Court: How would that go to the question of whether he had meaningful association in 1937, '38 and '39, the fact that he supports his father in 1958?

Mr. Robinson: I don't suppose it would. Your Honor, I think that is all the testimony of Mr. Mackie.

Mr. Luckey: Your Honor, I believe in the inter-

est of consistency the Government will take the position that the hearing was the basis of the present court action and that we would have no questions.

The Court: You are objecting to the testimony, in the first place; therefore, you do not want to ask him any questions?

Mr. Luckey: That is correct, your Honor.

Mr. Robinson: Your Honor, I am not sure whether this is made part of the record or not, but if it is not we think it should be, that the order and opinion of the Board of Immigration Appeals denying this request for a new hearing should be part of the record.

The Court: I think it might be in this document. Hand this to Mr. Robinson.

(Document presented to Counsel.)

The Court: Mr. Robinson, this is the complete file. Check to see if it is in those documents.

Mr. Robinson: Thank you.

The Court: If it is not—well, we may find out from [24] Mr. Hover. Mr. Hover, is the file which Mr. Robinson has in his hands the complete file?

Mr. Hover: It is, your Honor, and it contains all the original decisions of the Board of Immigration Appeals.

Mr. Robinson:

Mr. Luckey: Copy of which is attached to their petition, your Honor.

Mr. Robinson: Your Honor, the file is complete as far as I can see.

The Court: Do you desire to offer that record now?

Mr. Robinson: Yes, sir.

The Court: All right; it is admitted.

Mr. Luckey: We join in the offer, your Honor.

The Court: It is admitted.

Mr. Robinson: Now we have, your Honor, two character witnesses whose testimony might have some bearing on his meaningful association as alleged, and we wonder if the Court would care to hear testimony of those people?

The Court: I want to say this to you: If a man says, "I am not a member of the Communist Party; I never was a member of the Communist Party; I know very little about the Communist Party," is it your contention that even if he is perjuring himself, if you bring two character witnesses that that goes to the question of his meaningful association?

Mr. Robinson: No, your Honor. [25]

The Court: That is exactly what happened in this record that I have been trying to tell you. The administrative agencies didn't believe Mr. Mackie. At the first hearing he refused to take the stand even though he was warned about the consequences. Then he changed lawyers, and then he had this hearing at which he denied these various things. I have read the opinion, and the opinion says they do not believe Mr. Mackie. Now, really, I do not see what advantage there would be to put on these character witnesses, but I have told you I am letting you make your record. If you want to put him on, that is perfectly all right with me.

Mr. Luckey: We would object, your Honor, for the record.

The Court: All right.

Mr. Pozzi: We would like to call Mr. Sauvnen.

The Court: I am going to consider this is in the nature of an offer of proof.

Mr. Pozzi: All right, your Honor. [26]

OLIVER I. SAUVNEN

a witness called in behalf of Petitioner, having been first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Pozzi): Where do you live, Mr. Sauvnen? A. 9038 Northeast Humboldt.

Q. Your occupation is that of a machinist?

A. Yes.

Q. How old are you? A. 45.

Q. How long have you known Bill Mackie?

A. Since about 1930, 1931.

Q. You yourself are a naturalized citizen; is that correct? A. Yes, sir.

Q. You came to the United States in 1923; is that about right? A. I did.

Q. You also were a member of the Armed Forces of the United States and served in World War II; is that correct? A. Yes.

Q. Under what circumstances did you know Bill Mackie since 1930? How did you meet Bill?

A. Well, I can't quite remember how I met him, but we got to be fairly good friends.

Q. Were you active in sports, athletics? [27]

A. Well, in wrestling, weight-lifting only.

(Testimony of Oliver I. Sauvnen.)

Q. Was Bill Mackie also active in that sort of thing, in promoting athletics in the '30's when he was——

A. That's quite a ways back to remember. I can't quite recall what sports he was active in.

Q. Do you know Bill Mackie's reputation, then and now, for truth and veracity?

A. Well, as a friend, I couldn't have a better friend.

Q. Was his reputation good in the community?

A. So far as I was concerned.

Q. To your knowledge, was Bill Mackie ever a member of the Communist Party?

A. No, he wasn't.

Q. Were you ever a member? A. No.

The Court: Do you know his general reputation in the community in which he lives for being a law-abiding citizen?

(No response.)

Mr. Pozzi: Answer the question.

The Witness: Pardon?

Mr. Pozzi: Answer the Judge's question.

The Court: You ask the question.

Mr. Pozzi: All right.

Q. Do you know the general reputation in the community here in Portland of Bill Mackie since 1930 up to the present time [28] as far as being a law-abiding citizen? A. Yes.

Q. What is his reputation?

A. Good, as far as I know.

The Court: Were you a neighbor of his?

(Testimony of Oliver I. Sauvnen.)

The Witness: I lived a few blocks away from him.

The Court: Did you ever work with him?

The Witness: No. I did work on his car for him once in a while.

The Court: In 1937, '38 and '39 did you see him almost every day, or how often did you see him?

The Witness: Well, I used to see him once a week anyhow. In those days we were going to dances together.

The Court: Were those dances put out by the Workers Alliance and the Finnish Federation?

The Witness: No, I won't say they were. We went to places like Springer's Club.

The Court: You were going to the other dances. You were not going to Lenai and various places like that?

The Witness: No.

The Court: Are you Finnish?

The Witness: Yes.

The Court: You did not go to various Finnish associations?

The Witness: Oh, I used to go up to the hall once in a while to see if anybody was there. Then if there wasn't anybody [29] there I took off.

The Court: Then you would go out to Springer's?

The Witness: Yes, someplace out there.

The Court: Did you have any discussions with Mr. Mackie with reference to the political situation?

(Testimony of Oliver I. Sauvnen.)

The Witness: Never.

The Court: So you don't really know what his political views were?

The Witness: No, I couldn't say.

The Court: Go ahead.

Q. (By Mr. Pozzi): Did he ever try to talk Communism with you? A. No.

Q. You were close friends; is that right?

A. Yes.

Mr. Pozzi: That's all.

Mr. Luckey: No questions.

Mr. Robinson: I think that is all the witnesses we care to call at this time.

The Court: He wants to call another one.

Mr. Pozzi: We have some that have just known him a few years.

The Court: Do you want to have Mr. Mark Chamberlain, do you want to have him as a witness for you?

Mr. Pozzi: He has no connection with this case.

The Court: I have been reading the documents.

Mr. Pozzi: There is no connection.

(Witness excused.) [31]

ELIZABETH HAMLIN

a witness produced in behalf of Petitioner, having been first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Pozzi): Where do you live, Mrs. Hamlin? A. 4056 North Albina.

(Testimony of Elizabeth Hamlin.)

Q. How long have you lived here in Portland?

A. Oh, I have been here 1911.

Q. How long have you known Bill Mackie?

A. Oh, since he was a young man. I think about thirty-one or -two years.

Q. Mrs. Hamlin, under what circumstances did you know him?

A. Well, I always know that he has been very nice young man for, very nice fellow.

Q. Did he live near your house, within a few blocks, seven or eight blocks of your house, when he was a young man?

A. Well, no, but I know his folks and used to go once in a while to his home to see his mother and father.

Q. You visited in his home? A. Yes.

Q. You are Finnish, aren't you, Mrs. Hamlin?

A. Yes, sir.

Q. How old are you? A. I am 73. [32]

Q. Mrs. Hamlin, do you know what Bill Mackie's general reputation in the community was from the time you have known him and up to the present time, as to whether or not he has been a law-abiding citizen?

A. Well, I think he was a very good.

Q. You are not a Communist, are you?

A. Well, no, I never have even studied Communist. I don't know anything about it.

Q. No. You visited in Bill Mackie's home during the '30's; '37, '38 and '9?

(Testimony of Elizabeth Hamlin.)

A. Yes, the time I began to meet, that's about 31 or 32. That's the time we meet.

Q. Did you ever hear Bill Mackie talking to you or to anybody else about Communism or being a Communist?

A. I don't know anything about Communist, because I never studied Communist.

Q. Did you ever hear Bill Mackie talking about it? A. I don't think so, no

Mr. Pozzi: That's all. Well, one other question:

Q. What is his general reputation for truth and veracity, for being a truthful man?

A. Will you tell me that again?

Q. What is his general reputation for truth and veracity in the community; that is, for being honest and telling the truth and not being a liar?

A. Very nice. I don't see nothing wrong.

Q. Is he known as an honest——

A. He is very honest, and the whole family is very honest people.

Mr. Pozzi: That's all.

Mr. Robinson: That is all the testimony, your Honor.

The Court: Mr. Robinson, I told you I would give you an opportunity to complete your record on the motion. Go ahead.

(Witness excused.) [34]

Mr. Robinson: Your Honor, we have certain citations that we would like to put into the record.

The Court: You will have all the time you

want. At the time I stopped you before I didn't think it was a propitious place to do it, but go ahead now.

Mr. Robinson: We have made constitutional objections to the Act under which Mr. Mackie is being deported; that is, the Immigration and Naturalization Act, as amended. We renew the constitutional objections which were made in the previous case. We appreciate that the Court on those matters is bound by the Supreme Court decisions in the Harisiades vs. Shaughnessy and Galvan vs. Press cases, which your Honor knows, [34] and we wish to renew those objections for the record, particularly that the Act violated the First Amendment of the United States Constitution in that it impinges upon the freedom of speech of the Petitioner. Secondly, that it is an ex post facto law, and, thirdly, that it is violative of the Fifth Amendment in that it abridges Petitioner's right to due process of law, both substantive and procedural.

Finally, that the Act is a Bill of Attainder.

Now, from reading both the Shaughnessy case and the Galvan v. Press case, it indicates to me that the issue of Bill of Attainder was never reached by the Supreme Court in either of those cases and that that is an open issue. I don't know whether the Court cares to hear argument on that.

The Court: That was raised the last time.

Mr. Robinson: It was never adjudicated by the Court or mentioned in the opinions.

The Court: Me?

Mr. Robinson: By your Honor in the other case.

The Court: That was one of the issues raised, and I have read Justice Black's decision and opinion in which he raises that and comments upon it.

Mr. Robinson: He mentioned it, yes. Well, we wish to raise these matters, and on those grounds we move for judgment [35] in this case for the Petitioner. I think those are all the constitutional matters.

Your Honor, there seems to be a thought here that it might be helpful to the Court (This is, of course, up to your Honor), but we would be very happy to submit within a couple of days a brief comparing the record in Mr. Mackie's case in so far as alleged association with Communism with those which appear from the opinion the Supreme Court in the Rowoldt case.

The Court: Mr. Robinson, I will save you the trouble. I didn't go to bed until after 1:00 o'clock this morning, and I did that last night. I did that myself. That is the reason I know what is in that transcript, because I read it last night, and I read the Rowoldt decision, and then I read the Galvan vs. Press and the Harisiades case.

Mr. Robinson: That is all.

The Court: Mr. Luckey?

Mr. Luckey: The Government will stand on the record, your Honor. Of course, as your Honor appreciates, under the decisions the remedy concerning judicial review is to some extent limited, and we think that the record does support the finding of the Immigration and Naturalization

Service by substantial evidence. That will be the position of the Government.

I could suggest distinctions between the Rowoldt case, but I think that your Honor is undoubtedly aware of them. Of [36] course, in this situation the Rowoldt case was a voluntary disclosure by an individual who claimed no meaningful association, but here there is evidence of meaningful association denied by the Petitioner, found adversely to him by the Service, which, of course, I think makes the case more analogous to Galvan against Press than it does to the Rowoldt case; that distinction.

Mr. Robinson: I think there is a distinction. The distinction is that the Rowoldt case is much stronger for deportation than Mr. Mackie. This is not a question of the suspension of deportation where the admissions of the party have any bearing whatsoever, as in the Rowoldt case. This is a question simply whether or not there was meaningful association on the grounds of deportability in the first instance, and Mr. Mackie has denied any associations with Communism.

The record shows two very untrustworthy witnesses whom we feel should be brought here to give fully their testimony and to be cross-examined and impeached by their own statements. On the other hand, the Rowoldt case is replete with a political sophistication which Mr. Mackie, both from this record and his testimony today, simply does not have.

I think the Government has failed consistently to carry any burden of proof whatever in this case,

and I think for that reason Mr. Mackie should not be deported.

The Court: First as to the constitutional grounds, I [37] think that you were well aware all these grounds had been raised in his previous petition for writ of habeas corpus, and I considered them and held against him, and the Court of Appeals affirmed me on my opinion.

At that time, also, I considered the question of whether the testimony adduced at the hearing was sufficient to sustain the Board's findings, and I came to the conclusion that there was ample evidence to do that.

I cannot see how the Rowoldt decision helps this Petitioner, for the reason that the Petitioner, unlike Rowoldt, has always denied any participation in the Communist Party, any knowledge. On the contrary, there were two witnesses who testified to his participation.

Now you may attack Knipe all you want, but Knipe was trying to do Mackie a favor. He testified that he was a truthful man, that he never did anything that he didn't come to his educational needs. He was trying to avoid trying to bring Knipe into any type of meaningful association until cross examination when it was brought out.

As far as the other testimony is concerned, if the testimony is to be believed—and the Board apparently believed it—this man went to meetings over a period of a year and a half regularly. He attended weekly meetings. He worked at the book store even though he didn't get any money. He

met at the Labor New Dealer back office. He went to Aberdeen [38] where there was a District Director of the Communist Party. Rappaport was there on a high-level meeting. He was not a plain, ordinary member, according to the testimony, but he was a man who was on the Executive Board. Now that is a lot different than Rowoldt. It does not make any difference whether he denies it or not; that is what the administrative board held, and just because he denies it you cannot say that this is a better case than Rowoldt. The fact is that there is much more in this record than that in the Rowoldt case.

I believe that the testimony that was adduced here today is absolutely immaterial. I do not think it was properly admitted, but I permitted you to do it in order to make a record, but there is nothing here that changes my opinion that I had when the case was before me before, and, as I said, there is nothing in the Rowoldt decision which I believe can help the Petitioner.

Perhaps I should make it clear that I not only think there was evidence in the record to sustain the findings that way, but I believe that the testimony is true. I believe the testimony of Bob Wilmot, and I believe the testimony of Knipe, and I do not believe Mr. Mackie's testimony. I believe that he perjured himself before, and I believe that he perjured himself today because I think that the evidence is clear that he was a member of the Communist Party during the period in which it is said that he was a member. [39]

For that reason I will discharge the writ.

Mr. Robinson: If your Honor please, I wonder if—well, to request at this time. First, a statement of exception to enable us to prepare notice of appeal?

The Court: Very well.

Mr. Robinson: And continuing Mr. Mackie on bond.

Mr. Luckey: He is not on bond at this time, your Honor.

Mr. Hover: He is under our bond. He is not on the Court bond.

The Court: This record shows that this proceeding was commenced on June 17, 1952. He has been here close to six years from the time the Government proceeded. Apparently he has not done anything violent during all these periods of time. I think we can wait a few days.

As far as the bond is concerned, hold up your judgment. I mean hold up the entry of judgment until you are able to perfect your appeal papers.

Mr. Luckey: The previous bond, your Honor, in the previous proceeding was $5,000.

Mr. Pozzi: Wasn't that lowered at one time, Mr. Hover?

Mr. Hover: I do not recall.

Mr. Luckey: That is the one with the Immigration Service.

The Court: Frankly, I was going to refuse bail in this case, and I am going to hold up the entry of judgment until you tell me that it is all right,

and you make your application [40] to the Court of Appeals for the bond.

Mr. Robinson: Thank you, your Honor.

The Court: Because I cannot conscientiously give this man a bond in view of what I have held, and I want to give you time in which to make your presentation to the Court. [41]

On Monday, April 14, 1958, at 10:00 A.M., the following proceedings were had in the within-entitled cause. At this time and place Mr. Nels Peterson, of Attorneys for Petitioner, appeared in behalf of Petitioner, and Mr. C. E. Luckey, United States Attorney, appeared in behalf of Respondents.

Mr. Luckey: Your Honor, I have an order to submit. I have provided counsel for the Petitioner with a copy of proposed orders finalizing your Honor's order, as we understood at the completion of the hearing on the 10th. That is Civil 9741.

The Court: Is the Petitioner in court?

Mr. Peterson: Yes, your Honor.

(Petitioner, William Albert Mackie, comes forward.)

The Court: There is no provision here for bail or temporary restraining order or the fact that I denied this application. Did you intend to make a motion over again?

Mr. Peterson: It was my understanding from what your Honor had indicated that any restraining order or any enlargement on bail would have

to be down to the Court of Appeals. That was my general understanding. I just talked to Mr. Hover, and he advises me that, pending arrangements for his [42] transportation to Finland, he will continue him on his present bail, but he does intend to deport him forthwith.

I have prepared notice of appeal and bond for costs on appeal and would like to go to the Court of Appeals for enlargement on bail.

The Court: I am prepared to sign the order, but I think I should state the reasons why I am entering the order and why, as I stated previously, I would not grant the Petitioner bail or issue any restraining order.

The petition for a writ of habeas corpus in Civil No. 9741 was filed because the Board of Immigration Appeals refused to grant Petitioner either a new hearing or, in the alternative, discharge the warrant of arrest and remove the Petitioner from the class of deportable aliens on the basis of the Rowoldt case.

I have carefully reread the complete Immigration file in this case, which includes all the documents filed since June 17, 1952, and all the testimony taken in all of the hearings that were held. I have also read the Rowoldt case, and I am convinced that Petitioner does not come within the reach of the Rowoldt decision.

In the Rowoldt case, the Petitioner there, with commendable frankness, admitted his membership in the Communist Party and set forth in detail the activities in which he was engaged during the

short period of time during which he was a [43] member. The Government's whole case rested on the statements made by Rowoldt to an Immigration Inspector, and the truthfulness of Rowoldt's statements was not called into question. On the basis of such statements, the Court found that he had no meaningful association with the Communist Party.

In this case, unlike the Rowoldt case, the Petitioner has consistently denied his membership in the Communist Party. The Government produced two witnesses to prove his membership. One of them testified that he attended a plenum with Petitioner at Aberdeen, Washington, which plenum was attended by the top officials in the Pacific Northwest of the Communist Party. He further testified that the Petitioner was a member of the top fraction of the local Communist organization and that he was well aware of what was going on. ("He knew where he was going.") Another witness testified that he had attended from 30 to 35 closed meetings with the Petitioner, and I believe he also testified that Petitioner was on the Executive Board of the local Communist organization.

At this hearing before the Immigration Service Petitioner was given the opportunity to refute the testimony of these two witnesses and to explain his participation, if any. He refused to accept this invitation, even though he was warned of the consequences of his failure to testify.

After he was ordered deported, he did testify at a suspension of deportation hearing. At this hearing he denied [44] that he was a member of the Communist Party. His testimony, however, was evasive and unsatisfactory, and, as I pointed out in my prior opinion, his testimony was far from convincing.

In the present petition he also raised each of the constitutional grounds that he raised in the prior petition. I found that there was no merit in these contentions on the basis of Harisiades v. Shaughnessy, 342 U.S. 580, and Galvan v. Press, 347 U.S. 522.

Although the prior case was affirmed on the basis of my opinion and certiorari was denied, Petitioner raises the identical grounds in this petition.

The proceedings by which the Government has been attempting to deport Petitioner because of his alleged Communist activities have been going on for many years.

On June 17, 1952, Petitioner was served with a warrant of arrest.

On May 11, 1953, a hearing was held.

On June 30, 1953, a Special Inquiry Officer found the Petitioner was a former member of the Communist Party and ordered him deported.

On July 2, 1953, Petitioner appealed this decision to the Board of Immigration Appeals.

On September 8, 1953, the Board of Immigration Appeals dismissed the appeal.

On November 11, 1954, the Petitioner filed a motion [45] to reopen the proceedings.

On December 23, 1954, the Board of Immigration Appeals ordered the warrant of deportation withdrawn, and the Petitioner was given an opportunity to apply for a suspension of his deportation under Section 244 (a) (5) of the Immigration and Naturalization Act of 1952.

On February 2, 1955, a hearing on the application for suspension was held.

On February 16, 1955, the Special Inquiry Officer who presided at this hearing denied the application.

On March 2, 1955, Petitioner appealed this decision to the Board of Immigration Appeals.

On May 13, 1955, the appeal was denied.

By that time a petition, and later an amended petition, for a writ of habeas corpus and for injunctive relief had already been filed in Civil No. 7833.

On February 21, 1956, trial was held in Civil No. 7833.

On March 2, 1956, I rendered my opinion, denying the writ.

On March 7, 1956, Petitioner filed notice of appeal, and thereafter the appeal was perfected, briefs filed and oral arguments held.

On February 8, 1957, the Court of Appeals affirmed my opinion per curiam on the grounds and for the reasons stated in my opinion. [46]

On December 16, 1957, Petitioner's application for certiorari was denied.

On December 27, 1957, Petitioner filed a motion before the United States Immigration and Naturalization Service for another hearing based upon the Rowoldt case.

On March 26, 1958, Petitioner's application was denied after a re-examination of the entire proceedings, and in which it was pointed out that the petition for certiorari was denied eight days after the Supreme Court announced its decision in the Rowoldt case.

On April 4, 1958, the present petition for a writ of habeas corpus and complaint for injunctive relief to prevent agency action, Civil No. 9741, was filed just a few days before the Petitioner was ordered to surrender for deportation.

In my opinion, there is no more merit in this petition than there was in the previous one.

Almost six years have elapsed since the warrant was served upon the Petitioner, and the delay in this case, like in the case of Martin Jiminez v. Bruce Barber, decided by the Court of Appeals for this Circuit on January 30, 1958, has been occasioned solely by Petitioner's resort to administrative and court proceedings to assert contentions which have been found to be without merit.

I recognize that the law under which the Petitioner is being deported is a harsh one, but this is a matter for the [47] legislative branch of the Government and is outside the power of the Court.

In my view there was no substantial question asserted in this petition, and it is without merit. I assume that the Petitioner intends to appeal to

the Court of Appeals, and when the appeal is dismissed, he will again seek certiorari to the Supreme Court of the United States. In my opinion these appeals will be frivolous and taken solely for the purposes of delay.

I have denied defendant bail and have refused to grant any order which would prevent his immediate deportation. Of course, when the application is made to the Court of Appeals, that will be their responsibility.

I am going to sign the order presented by the United States Attorney unless there is objection to the form.

Mr. Peterson: No objection.

[Endorsed]: Filed May 21, 1958.

[Endorsed]: No. 15990. United States Court of Appeals for the Ninth Circuit. Willia Niukkanen, also known as William Albert Mackie, Appellant, vs. John P. Boyd, District Director, Immigration and Naturalization Service and Ernest Hover, Officer in Charge, Immigration and Naturalization Service, Appellees. Transcript of Record. Appeal from the United States District Court for the District of Oregon.

Filed: May 26, 1958.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals
For The Ninth Circuit

No. 15,990

WILLIA NIUKKANEN, also known as WILLIAM NIUKKANEN, also known as WILLIAM ALBERT MACKIE,
Petitioner-Appellant,

vs.

JOHN P. BOYD, District Director, Immigration and Naturalization Service, United States Department of Justice, and ERNEST HOVER, Officer in Charge, Immigration and Naturalization Service Office, United States Department of Justice, at Portland, Oregon,
Respondents-Appellees.

CONCISE STATEMENT OF POINTS ON APPEAL

Comes Now Petitioner-Appellant, Willia Niukkanen, and respectfully submits the following concise statement of points to be relied upon in this appeal:

1. The trial court erred in denying the petitioner's petition and in dismissing the same because petitioner is not within the class of deportable aliens under the Immigration and Nationality Act as amended, as interpreted by the United States Supreme Court in various recent decisions, including the case of Rowoldt v. Perfetto, 355 U.S. 115.

2. The trial court erred in denying petitioner-appellant's motion that the Federal Bureau of Investigation statements and reports of the witnesses who testified against the petitioner-appellant in the immigration department hearings be made available to petitioner and his attorneys.

3. The trial court erred in denying petitioner's motion that the witnesses Wilmot and Knipe, who testified against the petitioner-appellant at the immigration department hearings, be recalled to give testimony in this cause relating to the question of whether petitioner-appellant is within the class of deportable aliens under the Immigration and Nationality Act as interpreted by the United States Supreme Court in various recent decisions including that of Rowoldt v. Perfetto, supra.

4. The trial court erred in denying petitioner's petition and in dismissing it, because the Immigration and Nationality Act as amended, is in violation of the United States Constitution in that said Act violates freedom of speech and association, due process of law, and is a bill of attainder and an ex post facto law.

Dated this 4th day of June, 1958.

/s/ GERALD H. ROBINSON,
Of Attorneys for Petitioner-Appellant.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed June 6, 1958. Paul P. O'Brien, Clerk.

[Title of Court of Appeals and Cause.]

DESIGNATION OF RECORD ON APPEAL

Comes Now Petitioner-appellant, Willia Niukkanen, and respectfully designates the following as his record on appeal:

1. The entire record in the United States District Court for the District of Oregon in this case, including the entire transcript of proceedings before the Honorable Gus J. Solomon, Judge of the United States District Court for the District of Oregon, and all of the pleadings and other documents filed in said case, and all of the exhibits admitted into evidence in said case.

Dated this 4th day of June, 1958.

/s/ GERALD H. ROBINSON,
Of Attorneys for Petitioner-Appellant.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed June 6, 1958. Paul P. O'Brien, Clerk.

[fol. 90] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 15990

WILLIA NIUKKANEN, etc., Petitioner,

vs.

JOHN P. BOYD, et al., Respondents.

ORDER RELATIVE TO ENLARGING PETITIONER ON BAIL—
Filed April 22, 1958

Petitioner Niukkanen, while under deportation orders, petitioned the United States District Court for the issuance of the writ of habeas corpus and release from custody of immigration officials. The District Court denied issuance of the writ and this appeal followed.

Petitioner now requests we order him enlarged upon bail pending further proceedings.

We are of the opinion that there is a substantial question of law in the appeal and therefore order that the order for deportation be stayed pending further order of this Court. And it is further ordered that petitioner be enlarged upon the posting of bail in the sum of $2000.00 to be approved by the District Court or a Judge thereof.

Albert Lee Stephens, Chief Judge; Walter L. Pope, Frederick G. Hamley, Circuit Judges.

[fol. 91]
MINUTE ENTRY OF ORDER OF SUBSTITUTION—
December 11, 1958 (omitted in printing).

MINUTE ENTRY OF ARGUMENT AND SUBMISSION—
December 11, 1958 (omitted in printing).

[fol. 92]
MINUTE ENTRY OF ORDER DIRECTING FILING OF OPINION AND FILING AND RECORDING OF JUDGMENT—April 6, 1959 (omitted in printing).

[fol. 93]
IN UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 15,990

WILLIA NIUKKANEN, also known as WILLIAM NIUKKANEN, also known as WILLIAM ALBERT MACKIE, Appellant,

vs.

E. D. MCALEXANDER, Acting District Director, Immigration and Naturalization Service, Department of Justice, Appellee.

Appeal from the United States District Court for the District of Oregon

OPINION—April 6, 1959

Before: Stephens, Chambers, and Hamley, Circuit Judges

Hamley, Circuit Judge:

In this habeas corpus proceeding petitioner seeks to invalidate an order for his deportation as an alien who has been a member of the Communist party. After a hearing in the district court, an order was entered dismissing his application. Petitioner appeals, contending that he was

not shown to have a "meaningful" association with the Communist party, as that term is used in Rowoldt v. Perfetto, 355 U. S. 115, 120. He also argues that the act under which he was ordered deported is unconstitutional.[1]

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[1] The warrant of arrest in the deportation proceedings was issued on June 17, 1952. The statute under which the proceedings were instituted was therefore § 22 of the Internal Security Act of 1950, 64 Stat. 987, 1006 (amending the Act of October 16, 1918, 40 Stat. 1012, as amended) as amended by § 1 of the Act of March 28, 1951, 65 Stat. 28. The applicable part of § 22 of the 1950 act prior to the 1951 amendment reads as follows:

> "That any alien who is a member of any one of the following classes shall be excluded from admission into the United States:
>
> . . . . .
>
> "(2) Aliens who, at any time, shall be or shall have been members of any of the following classes:
>
> . . . . .
>
> "(C) Aliens who are members of or affiliated with (i) the Communist Party of the United States . . .
>
> . . . . .
>
> "Sec. 4. (a) Any alien who was at the time of entering the United States, or has been at any time thereafter, . . . a member of any one of the classes of aliens enumerated in section 1(2) of this Act, shall, upon the warrant of the Attorney General, be taken into custody and deported in the manner provided in the Immigration Act of February 5, 1917. The provisions of this section shall be applicable to the classes of aliens mentioned in this Act, irrespective of the time of their entry into the United States."

The 1951 amendment to the above-quoted statute reads as follows:

> ". . . That the Attorney General is hereby authorized and directed to provide by regulations that the terms 'members of' and 'affiliated with' where used in the Act of October 16, 1918, as amended, shall include only membership or affiliation which is or was voluntary, and shall not include membership or affiliation which is or was solely (a) when under sixteen years of age, (b) by operation of law, or (c) for purposes of obtaining employment, food rations, or other essentials of living, and where necessary for such purposes."

Such a regulation was promulgated by the Attorney General, effective April 4, 1951. See 16 Fed. Reg. 2907.

The amendatory act of March 28, 1951, setting out the above-quoted qualifications upon the meaning of the terms "members of" and "affiliated with" was repealed by the Immigration and Na-

[fol. 94] Petitioner, whom we shall call Mackie, is a native and citizen of Finland. He entered the United States in 1909 at the age of ten months, and has resided in this country continuously since that time. Mackie has lived in Portland, Oregon, for about thirty-three years. He had service in the United States Army for three months in [fol. 95] 1941, and for three days in 1942. He was honorably discharged for the "convenience of the government." Mackie married an American citizen on June 24, 1945. There are no children as the issue of this marriage, but his wife has a sixteen-year-old son by a former marriage. Mackie's aged father and mother and two sisters also reside in this country.

On June 17, 1952, a warrant for the arrest and deportation of Mackie was issued by a district director of the Immigration and Naturalization Service. The warrant was served on September 12, 1952. A hearing was held before a special inquiry officer beginning May 11, 1953, and ending May 21, 1953.

On June 30, 1953, the special inquiry officer issued a written decision determining that Mackie was deportable and ordering his deportation. The ground stated for this action was that Mackie had become a member of the Communist Party of the United States after entry into this country. The specific finding was that Mackie had been a member of the Communist party during the years 1937-1939.

Mackie appealed to the Board of Immigration Appeals. The Board found that the record established the ground of deportability by reasonable, substantial, and probative evidence. The appeal was accordingly dismissed on September 8, 1953. On November 11, 1954, Mackie moved to reopen the deportation proceedings to enable him to apply for suspension of deportation. This motion was denied on November 29, 1954, but when later renewed was granted on December 23, 1954.

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tionality Act of 1952, 66 Stat. 163, 280, effective December 24, 1952. See Schleich v. Butterfield, 6 Cir., 252 F.2d 191, 193. But the substance of the relevant portion of § 22 as originally enacted was incorporated in the Immigration and Nationality Act of 1952, 66 Stat. 163, 205, 8 U.S.C.A., § 1251(a)(6)(C). See Rowoldt v. Perfetto, supra, page 116.

The reopened hearing was held before a special inquiry officer. This officer, on February 16, 1955, entered a written opinion denying the application for suspension of deportation. Suspension was denied for the reason that Mackie had not made a "clean break" with the Communist party, and there was reason to believe that he was still sympathetic to its principles. The Board of Immigration Appeals affirmed this ruling on May 13, 1955.

While this application for suspension of deportation was pending, Mackie, on December 13, 1954, filed a petition in the United States District Court for a writ of habeas corpus. The grounds on which Mackie relied in this petition were that the evidence did not support the order of deportation, and the statute under which the order was entered [fol. 96] was unconstitutional. After the order denying suspension of deportation was entered on February 16, 1955, Mackie amended his petition for a writ of habeas corpus to include as an additional ground that the denial of his motion for suspension of deportation was arbitrary and capricious.

The district court after hearing rendered a decision denying the application for a writ of habeas corpus. Niukkanen v. Boyd, D.C.D.Ore., 148 F.Supp. 106. An order to this effect was entered on March 6, 1956. Mackie appealed to this court and we affirmed. Niukkanen v. Boyd, 241 F.2d 938. Certiorari was denied on December 16, 1957. 355 U.S. 905.

Rowoldt v. Perfetto, supra, was decided by the Supreme Court on December 9, 1957. On December 27, 1957, Mackie filed a motion before the United States Immigration and Naturalization Service for another hearing on his status as a deportable alien. The ground stated for this motion was that the decision in Rowoldt redefined the evidential and substantial requirements of membership in the Communist party so as to take Mackie out of the class of deportable aliens. This motion was denied by the Board of Immigration Appeals on March 26, 1958.

Relying on the same ground and also renewing the contention that the act is unconstitutional, Mackie filed the instant habeas corpus proceeding on April 4, 1958. The petition was denied by the district court, after hearing, on April 14, 1958, and this appeal followed.

The contention that the act under which the deportation order was entered is unconstitutional as applied to Mackie is identical with a similar contention made on the previous appeal. It was there disposed of adversely to Mackie and will not be re-examined at this time.[2]

We therefore turn to appellant's contention based on the Supreme Court decision in Rowoldt. Mackie argues that it was not proved that he had been a "member" of the Communist party within the meaning of that statutory term, as construed in the Rowoldt decision.

[fol. 97] In Galvan v. Press, 347 U.S. 522, the Supreme Court for the first time dealt with the meaning of the term "member" as used in § 22 of the Internal Security Act of 1950. In the course of its opinion the court discussed the kind of a showing which would be insufficient to establish membership and the kind of a showing that would not be required. It further defined the minimum showing that would have to be made by the government.

It was held, at least inferentially, that membership would not be established by proof that an alien had accidentally, artificially, or unconsciously in appearance only, joined the Communist party with no real knowledge of its platform and purposes. On the other hand, the court ruled, establishment of membership did not require proof that an alien had joined the Communist party with full appreciation of its purposes and program. The minimum proof required to establish membership, the court held, was that an alien had "joined the Party, aware that he was joining an organization known as the Communist Party which operates as a distinct and active political organization, and that he did so of his own free will."

Applying the latter test, the court in Galvan found that under the evidence upon which the hearing officer apparently relied the alien had been a "member" of the Communist party and was therefore deportable. This evidence was to the effect that the alien joined the party on the request of a man he assumed to be an organizer, he attended a number of meetings, he did not apply for citizenship because he feared his party membership would be exposed,

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[2] See, also, Ocon v. Guercio, 9 Cir., 237 F.2d 177, 179-180.

and he had been active in, and an officer of, the Spanish Speaking Club, an alleged Communist party unit.

In Rowoldt v. Perfetto, supra, the Supreme Court did not purport to modify the principles to be applied in construing the term "member" as announced in Galvan v. Press. It applied those principles to what the court regarded as the different facts of the Rowoldt case. It concluded that the minimum requirements of proof referred to in Galvan had not been met.

In this connection the court stated in effect that the evidence in Rowoldt failed to establish "the kind of meaningful association" required by the 1950 act, as amended. The use of the words "meaningful association" is but a shorthand [fol. 98] way of referring to the minimum-proof requirement for establishing membership as set out in Galvan.

The precedent value of Rowoldt, then, is not to be derived from an undue emphasis upon the words "meaningful association," as used in that opinion. Rather, it is to be gained by comparing the evidence of membership which was there found to be insufficient with that contained in the record of the case under current consideration.

In Rowoldt v. Perfetto the finding of "membership" rested on Rowoldt's own testimony. According to that testimony, Rowoldt joined the Communist party in the spring or summer of 1935, paid dues, and attended meetings. He remained a member until arrested late in 1935 in connection with deportation proceedings. His reason for joining the party was that he regarded the party and the "fight for bread" as going "hand in hand."

Rowoldt testified that he had no job at the time and that those around him had the idea that they had to fight for something to eat and for clothes and shelter. He and his associates, Rowoldt testified, were not thinking of "overthrowing anything." In stating that they had to "fight" for something to eat, Rowoldt meant that they had to ask the city, state, and national government for help. The kind of help they wanted was exemplified by the unemployment laws later passed and economic assistance received.

Rowoldt's only active work for the party was that of running its bookstore for a short period. He was a salesman in the store but received no compensation. This store was

an official outlet for communist literature. Rowoldt testified that he never advocated change of government by force or violence.

In the instant case, unlike Rowoldt, the government produced independent evidence concerning the alien's communist activities, and the latter initially offered no refutation except that of character witnesses. At the original hearing held in May, 1953, Mackie was called to the witness stand by the special inquiry officer and answered general questions concerning his age, residence, place of birth, and the like. The government then called two witnesses.

According to their testimony, Mackie was a dues-paying, card-carrying member of the Communist party from at least [fol. 99] 1937 until 1939. In the latter year he was dropped from membership for nonpayment of dues. During the period of his membership Mackie attended from thirty to thirty-five meetings of the "Albina Section" of the Communist party in Portland, Oregon. Once or twice a month Mackie went to the office of the "Labor New Dealer," a weekly trade union newspaper, to obtain copies for distribution. This newspaper was Communist controlled, and was considered to be a Communist party "setup."

Frequently during these visits to the newspaper office Mackie actively participated in discussions which members of the Communist party held in a back room. These discussions pertained to the policies of the party and the circulation of the newspaper as a party organ. On one occasion Mackie attended a closed party meeting in Aberdeen, Washington, referred to in party circles as a "plenum." This term was used by members of the party in referring to a meeting held for the purpose of reporting the regional activities carried on within the party.

Mackie, according to this testimony, was not an ordinary member of the Communist party, but belonged to what members of the party called the "top fraction," except with regard to its waterfront activity.

At the close of the government's case, several character witnesses were called to testify in Mackie's behalf. As before noted, however, Mackie declined to take the witness stand himself for the purpose of refuting the testimony of the government witnesses concerning his association with

the Communist party.[3] At later hearings on his motion to suspend the order of deportation, and in the district court on this habeas corpus application, Mackie did testify—categorically denying that he had ever been a member of the Communist party.

Although appellant attacks the credibility of the government witnesses, the special inquiry officer apparently found their testimony worthy of belief. The Board of Immigration Appeals and the district court found no warrant for [fol. 100] re-evaluating that testimony, and neither do we. Precedent for adopting this course is to be found in Galvan v. Press, where the Supreme Court deemed it appropriate to accept evidence which the hearing officer had found reliable.

In our view the evidence in the instant case more than meets the minimum requirements of proof to establish Communist party membership, as set out in Galvan v. Press, and as referred to in Rowoldt v. Perfetto as "meaningful association." There is no indication here, as in Rowoldt, that the alien joined the party only for "bread and butter" purposes. On the contrary, our appellant, unlike Rowoldt, actively participated in party councils, and was considered to be in a relatively high regional echelon of the party.

Mackie's association with the Communist party, in our opinion, was at least as meaningful as that of Galvan in Galvan v. Press.[4] It was much more meaningful than that of Diaz in Diaz v. Barber, 9 Cir., 261 F.2d 300, whom this court characterized as "a small rabbit in the Communist hutch."

Affirmed.

[File endorsement omitted]

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[3] The disadvantage to Mackie in his failure to rebut the testimony given by the government witnesses was called to his attention by the special inquiry officer, but Mackie persisted in his refusal to give further testimony.

[4] See, also, Williams v. Mulcahey, 6 Cir., 253 F.2d 709; Wellman v. Butterfield, 6 Cir., 253 F.2d 932; and Bong Youn Choy v. Barber, D.C.N.D.Cal., 162 F.Supp. 629, all of which refer to Rowoldt v. Perfetto, but hold the evidence sufficient to sustain a deportation order.

[fol. 101] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 15,990

WILLIA NIUKKANEN, etc., Appellant,

vs.

E. D. MCALEXANDER, etc., Appellee.

JUDGMENT—Filed and Entered April 6, 1959

Appeal from the United States District Court for the District of Oregon.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the District of Oregon, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the Order of the said District Court in this cause be, and hereby is affirmed.

[fol. 102]

IN UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Before: Stephens, Chambers and Hamley, Circuit Judges

MINUTE ENTRY OF ORDER DENYING PETITION FOR REHEARING —May 19, 1959

On consideration thereof, and by direction of the Court, It Is Ordered that the petition of Appellant, filed May 4, 1959, and within time allowed therefor by rule of court for a rehearing of the above-entitled cause, be, and hereby is denied.

[fol. 103] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 105]

SUPREME COURT OF THE UNITED STATES

No. 130, October Term, 1959

WILLIA NIUKKANEN, etc., Petitioner,

vs.

E. D. McALEXANDER, etc.

ORDER ALLOWING CERTIORARI—October 12, 1959

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

LE COPY

SUPPLEMENTAL TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1959

No. 130

WILLIA NIUKKANEN, ETC., PETITIONER,

vs.

E. D. McALEXANDER, ETC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED JUNE 20, 1959

CERTIORARI GRANTED OCTOBER 12, 1959

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

No. 130

WILLIA NIUKKANEN, ETC., PETITIONER,

vs.

E. D. McALEXANDER, ETC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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[fol. 1]

PROCEEDINGS BEFORE IMMIGRATION AND NATURALIZATION SERVICE

UNITED STATES DEPARTMENT OF JUSTICE

Portland 5, Oregon

File No.: A-5 085 301

Transcript of Hearing

Date:	May 11, 1953
Time:	9:50 A.M.
Place:	Portland 5, Oregon
Special Inquiry Officer:	Louis C. Hafferman
Examining Officer:	Howard L. Fenn
Interpreter:	None
Stenographer:	Leona L. Brown
Respondent:	William Albert Mackie
Alien's Representative:	Sidney I. Lezak, Attorney at Law
Language Used:	English

* * * * * * *

[fol. 12] Examining Officer to Witness:

Q. Will you state what your full and complete name is?
A. Walter Robert Patrick Wilmot.
Q. Have you ever used any other name, Mr. Wilmot?
A. Only in the Communist Party.
Q. What name did you use?
A. W. P. Ayer.
Q. Where do you now reside, Mr. Wilmot?
A. New York City.
Q. Where were you born?
A. Butte, Montana.
Q. Are you a citizen of the United States?
A. I am.

Q. Have you ever been a member of the Communist Party?

A. Yes, I was a member.

Q. Will you state when you joined the Communist Party?

A. In the Summer, late Fall of 1936 or early in 1937. I don't recall exactly.

Q. Where did you join the Communist Party?

A. Portland.

Q. Do you recall who solicited you to join?

A. Kenneth Fitzgerald, mainly.

Q. To what section of the Communist Party did you belong?

A. First I belonged to the so-called Cultural Section, a sort of catch-all of artists, writers, and then I was assigned to the Waterfront Section later, after I became editor of the paper they had here.

[fol. 13] Q. What paper are you referring to?

A. That was the "Labor New Dealer".

Q. How long did you remain a member of the Communist Party?

A. I was expelled in the Summer of 1939, July or August 1939.

Q. Were you active all during this period from the time of joining until your time of expulsion?

A. Very active.

Q. Did you pay dues to the Communist Party?

A. I did, up until about six or seven months before my expulsion. I don't remember how long, and I stopped.

Q. Were you issued a Communist Party membership book or card?

A. Yes.

Q. What did you do with your book or membership card?

A. I carried it with me sometimes and when things were hot I hid it.

Q. What was the ultimate disposition of the card?

A. I believe I tore it up.

Q. During the period of your membership in the Communist Party, did you attend Communist Party meetings?

A. Many.

Q. Where were these meetings held? That is as to city?

A. They were held in Portland, most of the meetings I attended. I believe I went to Seattle and went to some meetings, and Aberdeen. There was one in Centralia. I can't say exactly.

Q. Were these meetings of the Communist Party that you attended following your joining closed meetings? By closed I mean closed to all except Communist Party members?

A. Yes. Those that I term Communist Party meetings, there were no outsiders.

Q. Do you know the respondent in this case, William Albert Mackie?

A. I do.

Q. Under what name did you know him?

A. William Mackie.

Q. Will you state for the record approximately when you first met him?

A. Well, as a Communist I would—

Mr. Lezak: Just a minute. I object to the answer as being not responsive. As I remember, the question is will you state for the record when you first met him.

[fol. 14] Special Inquiry Officer: Objection sustained.

Witness: In the late Summer of 1936 or the early Winter thereabouts, and from that time on many times until I was put out of the Party.

Examining Officer to Witness:

Q. Will you state the circumstances under which you met him, if you recall them?

A. I met him once at the home of Helmi Burns, who was my secretary on the "Labor New Dealer".

Q. Was William Albert Mackie, to your knowledge, a member of the Communist Party?

A. Yes.

Mr. Lezak: Just a moment. I object to the question as calling for a conclusion, and I move to strike the answer.

Special Inquiry Officer: I will overrule your objection on the ground that it is responsive to the question and the witness should have knowledge thereof.

Mr. Lezak: I object on the ground that the question itself calls for a conclusion of the witness based upon—not based upon any foundation of facts which have been laid down.

Examining Officer: This is a question which will be supported by further questions. That is, the background will be laid by subsequent questions.

Special Inquiry Officer: I will overrule the objection.

Examining Officer to Witness:

Q. How do you know that the respondent was a member of the Communist Party?

A. I saw him pay dues in the Gerlinger Building and I saw him leave the office.

[fol. 15] Q. That was the Communist Party office, you say?

A. That's right.

Q. To whom did he pay these dues?

A. James Murphy, or he might have paid them to Clayton Van Lydegraff. I am not positive.

Q. Who was James Murphy?

A. He was the secretary.

Q. Of what?

A. The Portland Section of the Communist Party.

Q. Did you see him pay dues on more than one occasion?

A. I am not certain.

Q. Did you ever see his Communist Party book and membership card?

A. Yes. It was there on the table.

Q. Now you have stated that you attended closed Communist Party meetings. Did you ever see the respondent, William Albert Mackie, at any of these meetings which you attended?

A. Yes, I did.

Q. Did he hold any office in the Communist Party, as far as you were aware?

A. To the best of my recollection, I think he was a functionary in the Albina Group. Secretary, I believe. I am not positive of that. That is my impression.

Q. Were you a member of the Albina Section at any time?

A. No, but I attended meetings of practically all the branches in my capacity as editor of the paper, and other things involved, if you want me to explain it.

Q. Did the respondent ever attend any meetings of the branch or section to which you belonged, either the Cultural Section or the Waterfront Section?

A. I don't remember. I don't believe—sometimes the Waterfront Section was broad in scope to take in various other groups to take in some plan, but I can't say I ever saw him in the Waterfront Section.

Q. You stated that you were the editor of a newspaper known as the "Labor New Dealer"?

A. Yes.

Q. Who published or under what auspices was this paper published?

A. The Portland Industrial Council of the C.I.O. It was Communist set up and Communist controlled. That is they had a majority of the editorial staff and I carried out their decisions.

[fol. 16] Q. From whom did you receive your pay?

A. I received it from them. I don't think I got over $400 or $500 all the time I was there. I had other jobs besides.

Mr. Lezak: I move it be stricken as not responsive. He was asked who did he receive his pay from and he says I received it from them.

Special Inquiry Officer: I will sustain the objection.

Examining Officer to Witness:

Q. Will you state who—that is the name of the groups or the persons that paid you?

A. Well, James Fantz, who was president of the Portland Industrial Council, or secretary, I am not sure, but he was also an official of the Longshoremen's Union. He paid me and a chap by the name of George Kell, who was our business man. He paid me. I am not certain where the money came from because it came from so many different sources. It came from donations, orders from local unions. I think Bridges sent us some money sometimes.

Mr. Lezak: I move to strike all the last portion as to where the money came from as being not responsive. I think he has already answered the question.

Special Inquiry Officer: I will overrule the request because I think it is responsive to the question asked.

Mr. Lezak: Very well.

Examining Officer to Witness:

Q. You stated that you were expelled from the Communist Party. What ground were you expelled on?

A. Well, I turned in the letter of expulsion at the Bridges hearing. I don't know the exact wording. It was because of failure to keep certain disciplinary decisions that were made by the Control Commission. Also, for nonpayment of dues.

Q. Have you ever rejoined the Communist Party since the date of your expulsion?

A. No.

[fol. 17] Q. Then I take it that you are not now a member of the Communist Party.

A. No.

Q. Did you know the respondent, Mr. Mackie, personally?

A. Oh, yes.

Q. Did he ever come to your office, that is the office of the "Labor New Dealer" during your editorship?

A. Yes.

Q. Did you know him personally prior to your joining the Communist Party?

A. I met Mr. Mackie at open or semi-open Party functions and at dances and parties before I joined the Party and if I remember correctly, the Finnish Communist picnic at Astoria.

Q. Then there is no question in your mind concerning his identification as being the person that you saw at what you have called closed Communist Party meetings?

A. No, sir.

Q. Approximately how many meetings of the Communist Party did you see him?

A. I can't answer that exactly. I went to sometimes three meetings a week for about two years, and I know it was Mackie I saw at many. I can't say.

Q. More than one?

A. Oh, yes.

Q. Was this person that you have identified as Helmi Burns whom I believe you stated was your secretary, was she also a member of the Communist Party, to your knowledge?

A. Yes.

Q. When you met the respondent, William Albert Mackie at her home, did she make any remark to you as to his identity in the introduction?

Mr. Lezak: I certainly object to any question based on any remark that a third person made to him as to identification or any of the grounds that the Examining Officer is questioning about on the grounds it is pure hearsay.

Special Inquiry Officer: I will sustain that objection on the ground that the question was not too clear to me.

Examining Officer to Witness:

Q. I will restate the question. At the time you met the respondent, William Albert Mackie at the home of Helmi Burns, what was said in the introduction of the respondent to you?

[fol. 18] A. Well, I already had met Mr. Mackie, but we were discussing something about the circulation of the paper and various matters, Party matters. There wouldn't have been discussion in front of him if he weren't a Party member.

Mr. Lezak: I move to strike that last part of the answer as not being responsive to the question.

Special Inquiry Officer: I will overrule the objection on the ground that it is my opinion that it is responsive.

Mr. Lezak: I am referring particularly—the witness stated that certain matters would not have been discussed if he had not been a Party member.

Special Inquiry Officer: I believe that just further explains the preliminary part of that statement, so I will overrule that objection.

Examining Officer to Witness:

Q. Then as I understand it, the subject of discussion on this occasion was a Party matter. Is that correct?

A. That is right.

Mr. Lezak: I want to object to the question as being leading in the first place. In the second place, I want to object on the ground that it is improper to introduce evidence of any conversation such as this without some further identification as to what was said and that this whole question is directed merely to a conclusion. It is sort of a negative. It is something that concerns Party matters which would not have been discussed, according to Mr. Wilmot's testimony here.

Examining Officer: I think the explanation is in his first answer that they were discussing the circulation of the paper.

Special Inquiry Officer: I will overrule the objection.

[fol. 19] Examining Officer to Witness:

Q. At the time you were expelled from the Communist Party in 1939, was to your knowledge Mr. Mackie still a member of the Communist Party?

A. Yes.

Q. Did you ever attend any meetings of the Communist Party outside of the City of Portland at which time Mr. Mackie attended?

A. He attended one in Aberdeen.

Q. What kind of meeting was this?

A. It is what they called a plenum. It was merely a report of the work that was carried on. A plenum means a fullness, literally. It was to report work that was carried on by people in the Northwest.

Q. You stated earlier that Mr. Mackie had been to your office, that is the office of the "Labor New Dealer" on occasion. Is that correct?

A. Yes.

Q. For what reason would he come to your office? That is the office of the "Labor New Dealer"?

Mr. Lezak: I object to any testimony of the witness as to any reason. I think that the witness and the Examining Officer should be instructed that proper testimony should be what happened and what was said.

Special Inquiry Officer: I will sustain the objection.

Examining Officer to Witness:

Q. Was Mr. Mackie employed as a member of the staff on this newspaper?

A. No.

Q. Did he assist in the circulation of the newspaper?

A. Yes.

Q. Did he come to your office frequently in connection with the securing of papers for circulation?

A. Yes.

Q. Where was this paper circulated?

A. Well, all over the Portland area. Not much outside. Some went to Astoria, of course.

Q. Was it a paid position that he had in connection with the circulation?

A. I can't answer that. I believe there was some deal on circulation where you got a few cents, but I had nothing to do with that as to who paid him.

[fol. 20] Q. During the time when Mr. Mackie would come to your office with his duties in connection with circulation of the paper, was there any discussion as to the policies of the paper or as to the Communist Party's connection with the paper? You can answer yes or no.

Mr. Lezak: These questions are continually leading, suggesting the answers to the witness. I think he might ask him properly what occasion, what was said, what was done on any particular occasion. He asks him a blanket question covering any occasion, was this particular thing said or was this particular thing done. He hasn't identified the time of the occasion. He hasn't identified who was present at any of these conversations and he is attempting to direct his attention to a particular subject which he wants him to make an answer of yes or no about, and his own statement that he can answer yes or no is proof of that.

Special Inquiry Officer: I will sustain the objection.

Examining Officer to Witness:

Q. How frequently was the "Labor New Dealer" put out?

A. Every week.

Q. Did Mr. Mackie come to your office every week?

A. No, unless he came while I wasn't there.

Q. How frequently did he come to your office?

A. Once or twice a month. That's an average.

Q. Were there other matters not associated with circulation discussed?

A. Everything that dealt with the Party was discussed in that office. It was like a Branch Office of the Party Headquarters. As a matter of fact, that's what it was.

Q. Did anybody else occupy that office with you?

A. We had a back room that used to be used for a meeting hall, small meeting. Non-Communists exempt.

Mr. Lezak: Move to strike that last as being not responsive.

Special Inquiry Officer: I will overrule it.

[fol. 21] Examining Officer to Witness:

Q. Did Mr. Mackie take part in these discussions?

A. Yes.

Q. What was the subject matter of the discussions in which he took part?

A. General situation, what we were trying to do with our work in Portland, what we should do to broaden out the paper as a Communist organ.

Q. Then the discussions were, as I understand your answer, discussions of Communist Party policy?

Mr. Lezak: This is not the witness testifying. This is Mr. Fenn testifying again. I want to ask that the questions be confined as to what was said and what was done on a particular occasion. I don't want to keep repeating these objections.

Special Inquiry Officer: I will overrule that objection, since he is asking that question to clarify it.

Examining Officer to Witness:

Q. Could these meetings in the "Labor New Dealer" office be classed as Communist Party meetings?

Mr. Lezak: That is objected to as calling for a conclusion of the witness.

Special Inquiry Officer: I will overrule it because he was there and he should know what happened.

Witness: Of course they were.

Examining Officer to Witness:

Q. Did people other than employees of the paper and other than persons associated with the paper attend these meetings?

A. No.

Q. Did Mr. Mackie ever take part in any of the discussions at any of the meetings of the Communist Party that you ever attended with him?

A. Yes.

[fol. 22] Q. Did he to your knowledge ever officiate as chairman or whatever title was used at any of the meetings you attended?

A. No, sir. I don't think so.

Q. But he did take an active part?

A. That is right.

* * * * * * *

[fol. 25] Mr. Lezak to Witness:

Q. Did you ever find yourself refused admission to any meeting that you went to attend prior to your membership?

A. I never went to any closed meetings. Do you mean I went up and knocked on the door and they wouldn't let me in?

Q. Either that or any other refusal of yours to any admission of any meeting.

A. I was a long-time radical. I knew better than to try to crash a closed meeting.

Q. You never tried it and you were never refused admission. Is that right?

A. Yes.

Q. Now at those meetings you claim you saw Mr. Mackie?

A. Yes.

Q. How many times did you see him?

A. I am not sure how many times I saw him. I said that a few minutes ago.

[fol. 26] Q. Do you remember any specific meeting at which you saw him?

A. I can't remember a specific date. I worked 18 hours a day in those days.

Q. Can you remember any particular specific meeting about any specific subject where any speaker spoke? In other words, for example, if I ask you if you remember a specific baseball game at which Babe Ruth batted a home run. Do you remember any specific meeting?

A. Well, I remember at Aberdeen where Rappaport spoke for four hours.

Q. What was the purpose of that meeting?

A. You tell me and I will tell you. We used to get up there and everybody would get up and give a glowing account of what they had done. They were more or less fabricating, except they would report on their activity in various phases of the work, and always we would get the opening speech from Rappaport, and closing speech, and I know nothing to liken it to in America. I mean they want paper reports and anything like that. They had no agenda, except they took it by various areas and broke it down into people who spoke from there, and each one got up and told about what he had done. It was always linked with some big drive we had on in relation to promoting the Party in the lumber industry. This being a lumbering state, most of our activities were directed at that industry in that meeting. The longshoremen we didn't have to worry about. We had them.

Q. Was this an open meeting or a closed meeting in Aberdeen?

Special Inquiry Officer to Mr. Lezak:

Q. Are you referring to Aberdeen, Washington?

A. I am.

Witness:

A. Closed meetings.

Mr. Lezak to Witness:

Q. By a closed meeting I mean you come to a conclusion that only members of the Communist Party were admitted to that meeting.

A. Only card-packing members.

Q. Did you see anybody packing a card at that meeting?

A. I saw the people go in. It was a room taken in a hotel under some completely innocuous title like Forresters and the only way people could get in was by card.

Q. Did you see people showing a card at the door?

A. Yes, obviously.

[fol. 27] Q. Is that what you saw?

A. Yes.

Q. In other words, as each person walked in was there a credentials committee and the people took out a card and showed it to a person at the time at the door? Is that what you mean?

A. The person only flashed it at them. May I make this point clear, if you want to know, that these are the annointed people. When I showed up there or Mr. Mackie, they knew who we were.

Q. Then it is your contention that Mr. Mackie wasn't an ordinary Communist, but that he was one of the big wheels. Is that correct?

A. He belonged to what we call the top fraction.

Q. He was one of the top fraction in the Communist Party?

A. With the exception of what related to the waterfront activity.

Q. And at any of these open meetings do you remember any of those meetings—any of those specific meetings at which you saw Mr. Mackie at any open meetings before you became a member of the Communist Party?

A. I believe I saw Mr. Mackie at several dances here in Portland and mind you those were pretty tight affairs. I mean if anybody would bring you you had no trouble getting into those. No bystander from the street could run in. They ran a closer gate than that. You had to have somebody bring you.

Q. Let me call your attention back to this Aberdeen meeting. Do you specifically have a recollection right now

of having seen Mr. Mackie present a card at the door of that meeting upon entering?

A. No, I didn't see him present his card, but everybody in there had to present a card.

Q. You did not see him present a card.

A. No. I mean I don't recollect. I know that everybody had to have something to get in. It was pretty perfunctory in the case of people who were well known.

* * * * * * *

[fol. 31] Q. And during the time that you were the editor of the paper, you were attending, you said—and during the time you were a member of the Communist Party, you were attending about three or four meetings a week, I believe you testified. Is that correct?

A. That is correct.

Q. And you testified those were Communist meetings?

A. Yes.

Q. And some of those meetings were closed Communist meetings and some of those meetings were not closed?

A. I am referring specifically to closed. Two to three would be the average.

Q. You were attending two to three closed Communist Party meetings a week?

A. Yes.

Q. Where would those meetings take place?

A. Depending on the size, the Finnish Hall, and we used the Library under some innocent name. Those were usually pretty hush-hush meetings. We sometimes used the back office in the "Labor New Dealer", which small as it was we crowded enough in for a meeting, and at various homes around town.

Q. What specific discussion—do you remember any specific discussion that took place at any specific meeting that Mr. Mackie attended, other than this Aberdeen meeting?

A. No. I remember one occasion in the "Labor New Dealer" office which we discussed general policy of the moment.

Q. Do you remember what was said?

A. Not that long ago.

[fol. 32] Q. Do you remember any meeting at which Mr. Mackie attended in which an organized plot to accomplish

the overthrow of the Government of the United States by force and violence was discussed?

A. No.

Q. As a matter of fact, there were very few discussions of that kind in Portland during the depression. Is that correct?

A. Well, I don't think diabetics discuss diabetes every time they meet. We knew where we were going.

Q. Primarily your discussion was to do with the specific labor conditions, people on relief, and unemployment, and so forth and so on. That is the primary concern in those days?

A. Leading toward the revolution.

Q. Did you discuss ways and means of overthrowing the Government of the United States by force and violence at any of those meetings at which Mr. Mackie attended? You say you knew where you were going. Do you think Mr. Mackie knew where he was going?

A. I think Mr. Mackie knew where he was going.

Q. You just assume that because you know he was a member of the Communist Party. Is that right?

A. He wouldn't have been permitted in the meetings.

Q. In other words, the fact that he attended the meetings, you assume he knew. You never discussed—do you remember any discussion you had with Mr. Mackie?

A. I remember about the paper and its distribution.

Q. Was that, do you know, at your newspaper office?

A. Yes.

Q. Do you remember what was said and what was done at that particular occasion?

A. Well, it had to do largely with circulation. That was a great place for people to come and sit.

Q. A lot of people who were interested in the paper came and sat and talked about it. Is that correct?

A. Yes. Only Communists. I don't think I had three non-Communists. Everybody knew what it was. They didn't come there. Maybe some of the conservative boys would come in and give me the devil about it, but nobody came up to pay me any social calls that wasn't a Marxist.

* * * * * * *

[fol. 35] Q. How many Communists were there in Portland in late 1937?

A. I don't know exactly. It fluctuated. Membership changed constantly. People came in and dropped out.

Q. Well, were there more than a thousand?

A. I can't give a figure. There were hidden members. There were members that were generally known. There were members that I would say were in Portland—I would say less than a thousand, but it is astonishing how you would find out the people who were when you didn't believe they were.

Q. Would you say there were more than 500?

A. In Multnomah County?

Q. Yes.

A. I don't believe to my knowledge that there were over 300 or 400 active Party members.

Q. You don't know how many were hidden?

A. No, because I mean those are the ones definitely known.

Q. A number of the hidden, however, were known to you because you were a functionary.

A. I wasn't a functionary of the Party. I didn't say I was.

Q. I thought you said only functionaries attended this meeting at Aberdeen.

A. I believe I used the word top fraction members.

Q. By functionaries what do you mean? People who performed full time work for the Party and got paid?

A. Yes. I will say officials from now on. In a sense we were all functionaries.

* * * * * * *

[fol. 36] Q. If I remember your testimony correctly, you never attended regularly at any function of the Albina Group of the Communist Party. You said there was a group known as the Albina Group. Did you ever attend regularly at their functions at all?

A. Yes, I did.

Q. Do you remember whether or not you attended there in the capacity of the editor of this paper or in some other capacity?

A. Usually something would come up on the paper and I would exhort people to get behind it.

* * * * * * *

[fol. 45] Q. You testified that you saw him pay dues once. Is that correct?

A. I believe I saw him pay dues more than once. However, I specifically remember seeing him pay once.

Q. You specifically remember seeing him pay once. When and where was that?

A. I don't remember. It was in the Gerlinger Building.

Q. Who was present?

A. James Murphy, Clayton Van Lydegraff. I am not certain whether Harold Spring was there or not.

Q. Who was Harold Spring?

A. He was another functionary. I believe he became the section organizer.

Q. What was the procedure as far as paying dues is concerned?

A. We had a stamp and if I remember, right after I got in the Waterfront Branch and everything, why somebody used to pay my dues for me. They would come over there and collect them or something, but you have got stamps to put in. It is like the Elks or Moose or anything. One time there was an assessment for something they would dream up, and you paid an assessment for that. They were black books.

Q. Did you have your own book?

A. Yes.

Q. Did you go up and get your book marked when you paid?

A. I would get a stamp.

Q. Did you go to the Gerlinger Building?

A. Yes.

Q. Did all the Communist members go in there?

A. Some of them couldn't go in there.

[fol. 46] Q. Is there anything specific that happened on this particular day that makes you remember some 14 years ago that Mr. Mackie came in and who was present?

A. No, I just remember that.

Q. You said that his card was on the table. Did you read it?

A. No. He put the card down.
Q. What did you see?
A. I just saw the card.
Q. You saw him put a card down?
A. Yes.
Q. What else did you see?
A. Paid money.
Q. Do you know how much?
A. No, I don't recall how much he put down.
Q. What else was done?
A. He got the stamp and left.
Q. Did you see the card?
A. Yes.
Q. Could you read it?
A. No.

* * * * * * *

Q. Do you remember any conversation that you had with other people relative to Mr. Mackie?

A. Yes, I discussed Mackie with Kenneth Fitzgerald many times—a good loyal worker and what not, and specifically when we went to this Finnish picnic in Astoria.

Q. Was that a Finnish picnic or Communist picnic?

A. It was in the Summer of 1936 before I joined the Party, but Fitz said I will get you in, and he was down there selling Red literature.

[fol. 47] Q. And this was a picnic and there were some people there who were Communists and who weren't and a number of people there who were potential converts. Is that correct?

A. All I know is he said it was a Party picnic and if I stayed with him he could get me into it.

Q. Were there people there who were not members of the Communist Party?

A. I don't know.

* * * * * * *

[fol. 48] Q. You have also testified that you have been arrested many times. Is that correct?

A. That's right.

Q. Have you been convicted?

A. If drunkenness is a crime, I was convicted, yes. Some consider it is an illness.

* * * * * * *

[fol. 49] Q. I am calling it an illness in deference to you. I am asking you whether you were laboring under that condition, let's put it that way, during the period of time you have been testifying as to the facts.

A. I drank a great deal, but I held three jobs, worked 16 [fol. 50] hours a day, and I would have been expelled if I drank to excess in the Party. I think my record of achievement shows I couldn't have been addicted. I drank an awful lot and so did the other boys. All the time I was in Portland all those years I think I was picked up once for being intoxicated in Portland and I was hotter than a nail on a cannon. I think that's why they picked me up. If you mean was I in an institution, I wasn't. I never missed a day's work. Yale University says it is something which has become a problem. Certainly it is a problem. When I was a kid of 17 I took a car out and didn't know my capacity, and I was not booked, in Portland, and I had 30 days in the work house on this one occasion, and I thought it was for smashing up a car, for drunken driving, and I checked since, and found out it was plain drunkenness. I don't know whether drunkenness was considered a crime. I always drank to excess. I will admit that, but I don't say I drank enough to—how could I hold a job?

* * * * * * *

[fol. 64] Q. Please state your full and correct name?

A. Lee Arthur Knipe.

Q. Where do you reside?

A. Rt. 1, Box 55, Hillsboro, Oregon.

Q. Are you presently employed?

A. No.

Q. Have you testified in previous cases for the Immigration Service?

A. I have.

Q. Where?

A. Here in Portland, San Francisco, Spokane, and Seattle.

Q. How many cases have you testified in?

A. I believe 6 or 7.
Q. Are you appearing in answer to a Subpoena?
A. I am.
Q. Where were you born?
A. Redding, Pennsylvania.
Q. Are you a citizen of the United States?
A. I am.
Q. Have you at any time been convicted of a felony?
A. At no time.
Q. Were you ever a member of the Communist Party?
A. I was.
Q. Will you state when you joined the Communist Party?
A. I joined in 1937, in I believe February of 1937.
[fol. 65] Q. Where did you join?
A. Portland.
Q. Are you now a member of the Communist Party?
A. No.
Q. When did you discontinue or drop out of membership in the Communist Party?
A. 1942.
Q. What was your reason for discontinuing membership in the Party?
A. I was expelled.
Q. Do you know what the basis for your expulsion was?
A. They charged me with associating with former members of the Communist Party who were no longer members and now classed as undesirables.
Q. Were you given an opportunity for explanation?
A. No.
Q. Have you at any time since your expulsion ever rejoined the Communist Party?
A. No.
Q. Are you a member of any organization at the present time?
A. Brotherhood of Railway Clerks.
Q. Is that a union?
A. Yes, a union.
Q. What is the condition of your health?
A. Due to ill health having a stroke, two strokes, I was compelled to retire from my position with the railroad company.

Q. Are you drawing disability or retirement pensions?
A. Partial disability and A. D. C. for my children.
Q. What is A. D. C.?
A. Aid to Dependent Children.
Q. At the time you joined the Communist Party, who solicited your membership?
A. John Stenson.
Q. To what branch or section did you belong?
A. Albina Branch.
Q. Did you remain a member of the Albina Branch during all your Communist Party membership?
A. I did.
Q. During the time you were a member of the Communist Party did you belong to any other organizations?
A. Oregon Workers Alliance.
[fol. 66] Q. When were you a member of the Oregon Workers Alliance?
A. I joined the Oregon Workers Alliance about three months previous to the Communist Party, about November of 1936.
Q. And did you remain a member of the Workers Alliance until your expulsion from the Communist Party?
A. I did.
Q. Did you hold an office in the Workers Alliance?
A. State Executive Secretary.
Q. To what local of the Workers Alliance did you belong?
A. Unity Local.
Q. During your period of membership in the Communist Party, did you hold any office?
A. Yes I was a member of the County Executive Board and also State Executive Board and Educational Director of my branch.
Q. Do you personally know the respondent in this case, Mr. Mackie?
A. I do.
Q. Is he in the room at the present time?
A. Yes.
Q. Will you point him out?
A. Yes. (Indicates Mr. Mackie.)
Q. Please state when you first met Mr. Mackie?
A. The first meeting I attended of the Communist Party in 1937.

Q. Where were the meetings held. Do you recall?

A. Finn Hall.

Q. What kind of meetings of the Communist Party were they?

A. The first meeting I attended was an open meeting. That was when I was solicited and asked to join and I signed an application and a week later I was told to be present at this meeting, which was a closed meeting, that second meeting for members only.

Q. You state Mr. Mackie was present at the first meeting. Is that correct?

A. I wouldn't swear to that, at the open meeting, but at the second meeting.

Q. Was this a closed meeting?

A. It was.

Q. Was Mr. Mackie to your knowledge, ever a member of the Albina Branch of the Communist Party?

A. Yes he was.

Q. Did he ever hold any office?

A. No, not to my knowledge.

[fol. 67] Q. Did you subsequent to this meeting that you have already told of, attend meetings of the Communist Party which were closed, at which time Mr. Mackie was present?

A. I did.

Q. Can you give an estimation as to the approximate number of closed Communist Party meetings that you attended that Mr. Mackie was present?

A. Once each week we met and Mr. Mackie was quite a good member and I would say he attended at least 30 to 35 meeting that I was at.

Q. Where were the meetings held as a rule?

A. Usually held in Finn Hall.

Q. Were they held in other places as well?

A. Yes they were held in different members' homes.

Q. Did you ever have meetings in your home?

A. I did.

Q. Did Mr. Mackie ever attend meetings in your home?

A. I believe two or three, I am not sure but he did attend about three that I am positive of.

Q. Do you remember any of the other homes that you met in?

A. We met in the home of John Stenson. I believe that was the only other place that we met.

Q. Was Mr. Mackie ever present at meetings held in John Stenson's home?

A. I can't remember.

Q. During the time that you were a member of the Communist Party did you pay dues to the Communist Party?

A. I did.

Q. Were you issued a membership book?

A. I was.

Q. How much did your dues consist of?

A. I was unemployed, but I think my dues were 10¢ a week or 10¢ a month.

Q. Did you pay dues up until the time you were expelled from the Communist Party?

A. Yes.

Q. What happened to the Communist Party book that you were given at the time you joined.

A. I don't know what happened to it. It got lost in a lot of literature that I had. I threw a lot away and burnt some of it and I have never been able to find it.

Q. Did Mr. Mackie take active part in the meetings of the Communist Party, that is the discussions?

A. Yes, quite active.

[fol. 68] Q. Did he at any time serve in any official capacity to your knowledge?

A. In the executive board of the branch but never held any official office.

Q. Was he to your knowledge ever a Communist Party functionary?

A. Yes, he was.

Q. In what connection was he a Communist Party functionary?

A. He was employed and his dues were at that time 25¢ a month. If you were employed you paid more dues. He kept his dues right up to date, in fact he even helped to pay mine.

Mr. Lezak: I move to strike, it's not responsive.

Special Inquiry Officer: I will sustain the objection.

Examining Officer to Witness Knipe:

Q. Did you understand the question?

A. I thought I did.

Q. The question was, was Mr. Mackie a paid Communist Party functionary. Was he paid by the Communist Party?

A. Not that I know of. I misinterpreted the question.

Q. Was he a Communist Party functionary to your knowledge?

A. No.

Special Inquiry Officer to Witness Knipe:

Q. By that you mean official of the Party?

A. No, he was not an official of the Party.

Examining Officer to Witness Knipe:

Q. What is your understanding Mr. Knipe as a functionary of the Party to be?

A. A functionary, to my knowledge is an active member who holds an office and whether it be paid or unpaid, there are paid functionaries in organizations and unpaid functionaries.

Examining Officer to Mr. Lezak: Does that cover it?

Mr. Lezak: That's fine.

Examining Officer to Witness Knipe:

Q. Was Mr. Mackie also a member of the Workers Alliance to your knowledge?

A. Not to my knowledge.

Q. I think you stated you were a member of the Unity Local of the Alliance. Is that correct?

A. Yes I was chairman of the Unity Local and also State Executive Secretary of the State organization of the Alliance.

[fol. 69] Q. Did Mr. Mackie ever attend meetings of the Unity Local of the Workers Alliance?

A. Not to my knowledge.

Q. Did he have any connection with the Workers Alliance as far as you know?

A. No direct connection. He attended some of our doings that we held, initiations and things of that sort. He came to these, but not as a member.

Q. Who was the secretary of the Albina Branch during your period of membership?

A. Gretta Jessen.

Q. Did she collect dues from the various members of the Branch or subsections?

A. She did.

Q. Did you at any time ever see Mr. Mackie pay his dues?

A. I did.

Q. Did you ever see his Communist Party membership book?

A. I did.

Q. Explain in what way or how you were able to see the book?

A. He paid his dues and would hand the book to her and she would paste stamps in the dues stamp place or she would hand it to him to paste them in.

Q. Did you see it on more than one occasion?

A. Yes several times.

Q. What procedure was used in paying Communist Party dues. Were they always paid to the branch secretary or the section secretary or could they be paid to any representative of the Party?

A. I usually paid them to the secretary of the branch. However there were times and I couldn't attend meetings, and you could send them along with some member and they would pay it to the secretary.

Q. Could dues have been paid to someone like James Murphy?

A. They could, but I never remember of them having been paid to Murphy.

Q. What did you tell us your position was in the Communist Party?

A. Educational Director.

Q. As to your duties as educational director, what were you required to do?

A. I was to help teach the membership of the works of the Soviet Union and also to instruct them how to carry on the work in their organizations, other than the Party and

also how to conduct themselves at a Party meeting and to carry out the line of duties which were given to them, such as members of the Communist Party, like distributing literature and things of that sort.

Q. Have you ever held any classes?

A. Not outside the branch. We used to have a period each meeting night for about a half hour that we took up the study of these text books that I referred to and then we would have a discussion and I would assign a few questions for them to speak on for the next meeting, and which I would call on them to answer.

[fol. 70] Q. Did Mr. Mackie ever participate in these classes or periods of instruction that you had in this Branch?

A. No more than other members did.

Q. Have you attended Communist Party schools during your period of membership?

A. Yes.

Q. Where were these schools held?

A. Finn Hall.

Q. How many schools did you attend?

A. Two.

Q. What was the duration of the schools, more than a day or less?

A. One in Finn Hall ran about 10 days and then one while in Seattle, just two days.

Q. Was Mr. Mackie present at either of the schools you attended?

A. No.

Q. Did Mr. Mackie ever help you distribute literature that was part of your duty to distribute as educational director?

A. No.

Q. Did he at any time ever serve under your direction as a helper, literature worker in the Communist Party?

A. No.

Q. Was Mr. Mackie employed at the time you knew him during your period of membership in the Communist Party?

A. Yes.

Q. Where was he working?

A. I do not know.

Q. What type of work did he do to your knowledge?

A. I couldn't say for sure. I thought that he was working on some kind of lumber job, but I am not positive of that, I couldn't say for sure.

Q. Did you ever attend any Communist Party conventions?

A. Yes.

Q. Was Mr. Mackie ever present at these convention or conventions to your knowledge?

A. No. I don't think so.

Q. Did you have any personal association with Mr. Mackie during the period of time which you testified that you belonged to the Party?

A. Yes.

Q. There is no doubt in your mind as to the person who is present here this afternoon, Mr. William Albert Mackie, as being Bill Mackie, to whom you referred to in your testimony?

A. Absolutely not.

[fol. 71] Examining Officer: No further questions.

Mr. Lezak to Witness Knipe:

Q. When did you last see Mr. Mackie?

A. 1941.

* * * * * * *

Q. In 1941 was he a member of the Communist Party, to your knowledge, or had he left the Party earlier?

A. I don't know if he was a member at that time as he moved away, he was working outside of Portland.

Q. Do you know where he worked?

A. I couldn't say for sure, I heard in Idaho at an unknown place.

* * * * * * *

Q. Do you specifically remember as to whether or not he attended any meetings of any branch of the Communist Party in 1942?

A. No.

Q. You remember that he did not?

A. I remember that he did not.

Q. In 1941 do you remember whether he attended any meetings of the branch?

A. He did not.

Q. Did he in 1942?

A. He did not.

* * * * * * *

[fol. 72] Q. Did the Albina Branch at that time actively plot and plan any armed overthrow of the Government of the United States which Mr. Mackie was present? By that I mean was there any discussion as to any immediate use of armed force to overthrow the Government of the United States during the time that you were present in the branch?

A. No discussion of armed force other than everything was to do with leading up to a revolution.

Q. Leading to an eventual revolt?

A. Yes.

Q. Did Mr. Mackie in your presence ever advocate the overthrow of the Government by force and violence or the use of illegal means?

A. No he never did.

Q. Would you say, to your knowledge, that Mr. Mackie was one of those people who were more particularly interested or concerned with the problems that faced the country during the depression such as unemployment and relief.

A. I think very much interested. I think he took into consideration the sufferings of the people in the depression and was very sympathetic toward their welfare.

* * * * * * *

[fol. 73] Q. Now Mr. Knipe with reference to these meetings that took place at Finn Hall, you say that these meetings were closed meetings, and by that what do you mean?

A. Only that members of the branch were admitted to these meetings.

Q. Who determined who was a member of the Branch?

A. We only had about 25 or 35 members and everyone was known by others and if one was expelled in between meeting nights the branch would have been notified that such a party had been expelled and wouldn't admit him to any of the meetings.

* * * * * * *

[fol. 75] Q. Was he what you would call one of the Party intellectuals?

A. What do you mean by that?

Q. Was he very much on theory, political discussion?

A. No.

Q. He was more interested in bread and butter topics of the day, what to do for unemployment and relief?

A. I would say so, yes.

Q. Was most of the activities of the Albina Branch towards these specific problems?

A. Yes they were.

* * * * * * *

[fol. 83] Examining Officer to Witness Knipe:

Q. During the period of your membership in the Communist Party was the question ever discussed at Party meetings as to what answer would be given by the members holding party membership if questioned by the police or other public authorities?

A. It was.

* * * * * * *

Examining Officer to Witness Knipe:

Q. What advice was given?

A. As educational director of the branch I had instructions to ask all members of the branch to never carry their dues book in case they were ever arrested or picked up to deny it, that there was no possible way that they could be [fol. 84] proved members of the Communist Party without that dues book.

Q. Was that instruction given to all members of the Albina Branch to your knowledge?

A. To my knowledge I was told by the chairman to so instruct the membership of the meetings when they attended. It was given out to every branch in the State of Oregon and it was carried out I believe that some branches instructed their members to say that they were members of a progressive political organization, the Progressive Party. But as far as our branch was concerned we did not bring out Progressive Party, we just asked them to deny

that they were ever members of the Communist Party and there was no way it could be proved without that book.

* * * * * * *

[fol. 85] Hearing resumed 10:00 A.M. May 21, 1953, with the same persons being present, Guido F. Caramella, Stenographer.

* * * * * * *

[fol. 93] Mr. Lezak to Witness Knipe:

Q. As I gather the substance of your testimony and I am just giving this as a memory refresher and I am asking you whether or not it is correct and you can correct me if I am misquoting you in any way. You understand that?

A. Yes.

Q. You saw Mr. Mackie at a number of meetings that you claim were closed meetings of the Communist Party; that he was not a functionary of the Party; that you yourself taught members the works of the Soviet Union as the educational chairman of that group, but that Mr. Mackie did not participate in any of the discussions that you held in that connection; that Mr. Mackie did not distribute literature and that Mr. Mackie never served under your direction in any capacity and that as near as you know Mackie never attended any Communist Party conventions. Is that correct?

A. Yes. That's right. I would like to correct you on something. You referred to me as educational chairman. I was educational director.

Q. But that is a correct summary of your testimony as far as I went. Is that correct?

A. Yes. That's right.

Q. At how many meetings did you see Mr. Mackie?

A. He attended regular each week. I would say from about a year and a half at least. A year and a half.

Q. Were dues paid at these meetings by everyone attending at each week's meeting?

A. Not at each week meeting.

[fol. 94] Q. Once a month?

A. Yes.

Q. Was there one monthly meeting at which dues were paid?

A. You could pay them at any time.

Q. That is during any meeting dues could be paid?
A. Yes.
Q. Did you see each of the persons attending these meetings pay dues?
A. Yes.
Q. At each time that each of these persons paid dues did they present a book of some sort to the person who received their dues?
A. Yes.

* * * * * * *

[fol. 95] Mr. Lezak to Witness Knipe:

Q. If you don't understand this question you tell me that you don't understand before you answer it. I don't want there to be any other confusion about this. Did you see each of the members or people who attended those meetings pay dues for the Albina Branch of the Communist Party? Did you see each of these people pay dues?
A. Yes when I was present. And if they paid dues at the time that I was present, I would say that I saw them pay their dues.
Q. Did all of these people who were present at those meetings pay dues at sometime or other to your knowledge?
A. Yes.

* * * * * * *

[fol. 128] Hearing resumed at 1:10 P.M. June 29, 1953, the same persons being present.

* * * * * * *

COLLOQUY

Examining Officer: It is my understanding that Mr. Mackie does not wish to testify concerning allegations made by the Government on charges contained in the warrant of arrest as well as the testimony given by the witnesses. Is that correct?

Mr. Lezak: That is my understanding.

Special Inquiry Officer: So that there may be no misunderstanding on the part of counsel or on the part of respondent, at this time I wish to state for the record that a deportation proceeding is not a criminal action. It is civil in its nature. An alien may not refuse to answer questions

properly asked by an Immigration officer designed to ascertain whether such an alien is subject to deportation. In the last reported decision of which I am aware, being Interim [fol. 129] Decision No. 427, decided by the Board of Immigration Appeals on March 18, 1953, in the *Matter of K.*, the Board stated: "Where there is a duty to speak, silence is evidence of a most persuasive character." In that decision, the Board quoted that case of United States ex rel. Bilokumsky v. Todd (263 U. S. 149). In that case the Board found that it was the duty of the respondent to speak and his silence was without legal justification. And they viewed silence in that case as evidence.

Mr. Lezak: May I state that I am aware of the quoting of that decision and that I have advised Mr. Mackie as to his rights in that regard.

Special Inquiry Officer to Respondent:

Q. Do you understand what I have just stated for the record, Mr. Mackie?

A. I don't quite understand what it all means, no.

Q. It means just simply this. Two Government witnesses who have appeared here have testified that they have seen you at closed meetings of the Communist Party. There has been no evidence to refute those statements and since you have refused to testify, it will have to be assumed that the statements made by those two witnesses are correct, since it has not been refuted.

Mr. Lezak: I am advising Mr. Mackie at this time that he need make no further statements without consulting his attorney first.

Special Inquiry Officer: Do you have any further testimony or evidence to offer at this time, Mr. Lezak?

Mr. Lezak: May we be excused for one moment? I realize this is somewhat irregular, but my client has a question.

(Mr. Lezak and Mr. Mackie leave the room for approximately five minutes.)

Mr. Lezak: After consultation with my client, I have nothing further to offer.

* * * * * * *

[fol. 128a]

BEFORE THE
IMMIGRATION AND NATURALIZATION SERVICE
UNITED STATES DEPARTMENT OF JUSTICE
Portland, Oregon

File: A-5 085301

In re: Willia Niukkanen alias William Niukkanen, now known as William Albert Mackie

In Deportation Proceedings

In Behalf of Respondent: Sidney I. Lezak, Attorney at Law, Pacific Building, Portland 4, Oregon

Charges:

Warrant: Act of 1918—Member of Communist Party of the United States

Lodged: None

Application: None

Detention Status: Released under $1000 bond March 24, 1953.

Warrant of Arrest Served: September 12, 1952

OPINION—June 30, 1953

Discussion: This record relates to a 44-year-old married male, a native and citizen of Finland, who was born at Wiipuri, Finland, on November 24, 1908. He entered the United States for permanent residence at Sault Ste. Marie, Michigan, on September 5, 1909, and appears to have since resided uninterruptedly in the United States. That entry has been verified.

Two witnesses, native-born citizens of the United States, both ex-members of the Communist Party, testified for the Government that they attended meetings with the respondent, which meetings were restricted to members of the Communist Party. The evidence presented in behalf of

the Government relative to the respondent's membership in such party has not been refuted.

The first witness, Walter Robert Patrick Wilmot, presently a script and novel writer in New York City, who was a resident in Portland, Oregon, from 1934 to 1944 testified that he joined the Cultural Section of the Communist Party in Portland, Oregon, during the latter part of 1936 or early part of 1937 and thereafter assigned to the Waterfront Section of said party at about the time he became editor of a trade-union newspaper in about September, 1937. He remained a member of the Party and Waterfront Section until his expulsion from the Party in about July or August, 1939. During the period of his membership and up until about six or seven months prior [fol. 128b] to his expulsion he was very active in the Party, attending two to three closed meetings weekly, including the Albina Section of the Party, of which the respondent was a member from at least the first part of 1937 and up until sometime in 1939. Wilmot did not testify that he ever observed the respondent as being present at a meeting of the Albina Section.

Wilmot testified that he first met the respondent in about the summer of 1936, or prior to the time that he (Wilmot) joined the Party, which he recalls as having been at a Finnish picnic at Astoria, Oregon, sponsored by the Communist Party but apparently not limited to members of the Party. After Wilmot joined the party he again met the respondent in the home of a Mrs. Helmi Burns, also then a member of the Party, who was engaged in secretarial work in Wilmot's newspaper office, at which time matters pertaining to the Party were discussed which would not have been discussed in the presence of the respondent had he not been a known member. He also asserted that he saw the respondent pay Party dues in the office of the Portland Section of the Communist Party located in the Gerlinger Building, Portland, Oregon, for which he was given stamps which the respondent affixed in his membership book.

Wilmot also related that Mackie came to the office of the newspaper, the "Labor New Dealer" (which Wilmot edited) once or twice a month to obtain copies of the paper for

distribution, which was published weekly. He alleged that the said newspaper was a "Communist set-up and Communist controlled" in that the major portion of the members of the editorial staff were Communists known to him as such and that he carried out their policies. In connection with the respondent's visits to such office, the witness testified that frequent meetings were held in a back room at which members of the Communist Party were present and discussions had in reference to the policies of the party and the circulation of the newspaper as an organ of the Communist Party, in which discussions the respondent took an active part.

In addition, Wilmot also testified that he attended a meeting in Aberdeen, Washington, at which the respondent was present, which he referred to as a "plenum", i. e., a meeting which was held for the purpose of reporting the activities carried on within the Party in certain areas of the Northwest, which was also restricted to members of the Communist Party. This witness also stated that the respondent was still a member of the Communist Party at the time that he ceased attending meetings.

In response to a question by respondent's counsel to the witness Wilmot, reading as follows "Did you discuss ways [fol. 128c] and means of overthrowing the Government of the United States by force and violence at any of those meetings at which Mr. Mackie attended? You say you knew where you were going. Do you think Mr. Mackie knew where he was going?" the following answer was given: "I think Mr. Mackie knew where he was going." (p. 32).

The witness Wilmot at all times responded to questions without hesitation, was at all times able to grasp the meaning of the questions asked and found it unnecessary to cogitate, which would in itself be a strong indication that he knew the facts about which he was testifying. He has a keen intellect. Although he and the respondent do not appear to have been intimate friends they were fairly well acquainted with each other from their associations as comrades in the Communist Party. The testimony of this witness is regarded as credible. He has admitted that he has drank to excess (p. 50) but not to the extent that it has impaired his mental faculties or means of livelihood.

The second witness, Lee Arthur Knipe, testified that he joined the Communist Party in about February, 1937, in Portland, Oregon, and was expelled in September or October, 1942, for associations with former members of the Party who for that reason were regarded as undesirables. During the period of membership of this witness he was a member of a group known as the "Albina Section" (Note: It is apparent the group adopted the name by reason of location in the Albina District of the City of Portland). This witness testified that the respondent was present at the first closed meeting of the Communist Party attended by the witness and that thereafter he attended from about 30 to 35 meetings with the alien, restricted to members of the Party, two or three of which were held in the home of the witness. This witness was educational director of the section of which he was a member. He also testified that he saw the respondent pay his Communist Party dues to the secretary of the branch or section and affix the stamps received therefor in his membership book. He last attended a meeting with the respondent in about 1939, after which the respondent was dropped from membership for non-payment of dues on orders received from one James Murphy, then secretary of the Communist Party in Portland, Oregon. He also related that there were from 30 to 35 members in the Albina Branch of the Party during the period of his membership and that for that reason they were all acquainted with each other.

Knipe further testified that he and the respondent were close friends, not only having attended Communist Party meetings together but that he has visited in the home of the respondent's parents, where the respondent lived. He did not testify that the respondent's parents were members of the Party.

[fol. 128d] The witness Knipe on cross-examination was reluctant in giving testimony about an arrest and conviction in California in 1930 on a forgery charge which resulted in a minor penalty. Counsel attempted to impeach the credibility of this witness on such ground. However, that is a matter extraneous to the issues involved here and the reason for his reluctancy to testify in reference thereto was later adequately explained (pp. 87-88). There is

no reason to doubt the veracity of the witness Knipe in reference to his associations with the respondent in meetings restricted to members of the Communist Party.

Five witnesses were presented by the respondent, who may be classified as character witnesses since neither has ever been labeled as a member of the Communist Party and consequently neither has any knowledge of the facts. Therefore, their testimony need only be briefly discussed.

J. Rinta, past pastor of a Finnish church in Portland, Oregon, met the respondent in 1944, at which time he officiated at the respondent's marriage. He has never visited in the home of the respondent, the respondent has never been a member of his church, there has been no close acquaintanceship and they have never discussed political issues.

George Wayne Jackson, an employee of the Oregon State Fish Commission, met the respondent in 1943, or prior to the respondent's marriage, at which time he was courting his spouse who at that time was then renting a room from this witness. After the respondent's marriage he has gone fishing and hunting with the respondent, they have visited together in their homes but at no time has there been any discussion in reference to respondent's attitude toward Communism or other political matters.

The respondent's wife, Irene Mackie, testified that she was married to the respondent on June 24, 1944. She has a son, 11 years of age, born to a prior marriage, who also resides with the respondent. She testified that at no time has the respondent ever discussed with her matters relating to the Communist Party. Even after the respondent was arrested on September 12, 1952, under deportation proceedings she has not questioned him about the matter nor has he volunteered information in respect thereto nor denied that he had been a member of the Communist Party.

Marguerite Jensen, testified that she has been a neighbor and acquainted with the respondent for the past nineteen years. She also testified that she has never heard the respondent discuss politics or other matters which would indicate to her one way or the other his attitude toward Communism.

[fol. 128e] Lillian Marian Mackie, a sister of the respondent, a practical nurse, three years younger than the respondent, testified that she has never discussed the matter of Communism with her brother, or other political matters nor has she even as much as attended any function at the Finnish Hall in Portland, Oregon, where the Albina Section of the Communist Party also held meetings, which is located within the Albina District and not too far distant from the place where she has resided, which in itself seems unusual since she is of Finnish extraction, lives in what is regarded as a neighborhood of Finnish people and such hall has been a recreation center. As has been observed and as she has testified, the respondent is a reticent individual.

There are favorable factors. The respondent has lived in the United States since he was less than one year of age. He had 95 days service in the U. S. Army, having been drafted in 1944 and discharged for physical reasons. He is married to an alleged native-born citizen of the United States. However, these matters have nothing to do with the removal of the alien from a deportable class as specified by law. Both he and counsel were informed as to his privilege of submitting an application for suspension of deportation under Section 244(a)(5) of the Immigration and Nationality Act on May 21, 1953 (p. 96). No such application has been submitted and at the resumed hearing had on June 29, 1953, the respondent elected to not further testify. Therefore, the testimony as given by the witnesses for the Government must be regarded as substantial and probative. As pointed out *In the Matter of K.*, Interim Decision #427, decided by the Board of Immigration Appeals on March 18, 1953, where there is a duty to speak, silence is evidence of the most persuasive character (*United States ex rel. Bilokumsky* v. *Tod,* 263 U.S. 149). So that there would be no misunderstanding, counsel and the respondent were duly advised as to the quoted decisions. Therefore, it is found that in the instant case where there is a duty to speak and his silence in reference to membership in the Communist Party as related by Government witnesses that his silence is considered as evidence. No attempt will be made to speculate in this decision as to

the reason why he has taken the position which he has. It is found, therefore, that the charge as contained in the warrant of arrest is sustained from the evidence in the record.

The respondent did not elect to specify a country to which he desires to be deported, if it is so ordered.

Findings of Fact: Upon the basis of all the evidence presented, it is found:

[fol. 128f] (1) That the respondent is an alien, a native and citizen of Finland;

(2) That the respondent last entered the United States at the Port of Sault Ste. Marie, Michigan, on September 5, 1909;

(3) That the respondent was a voluntary member of the Communist Party of the United States during the years 1937, 1938 and 1939.

Conclusion of Law: Upon the basis of the foregoing findings of fact, it is concluded:

(1) That under the Act of October 16, 1918, as amended, the respondent has been, after entry, a member of the following class, set forth in Section 1 of said Act: An alien who was a member of the Communist Party of the United States.

Order: It is ordered that the alien be deported from the United States in the manner provided by law on the charge contained in the warrant of arrest.

Louis C. Hafferman, Special Inquiry Officer.

[fol. 128g]

U. S. Department of Justice

Board of Immigration Appeals

File: A-5085301—Seattle

In re: Willia Niukkanen or William Niukkanen, now known as William Albert Mackie

In Deportation Proceedings

In Behalf of Respondent: No one

Charges:

Warrant: Act of 1918—Member of Communist Party of the United States

Lodged: None

Application: Termination of proceedings

Detention Status: Released under $1,000 bond

Warrant of Arrest Served: September 12, 1952

Opinion—September 8, 1953

This is an appeal from the order of the special inquiry officer requiring the respondent's deportation on the ground stated above. The respondent contends that the evidence of record is insufficient to establish deportability and that the statute under which the charge has been laid is unconstitutional.

The evidence of record is fully discussed in the order of the special inquiry officer and need not be repeated. Respondent did not testify.

Briefly, the record establishes that the respondent is a native and citizen of Finland, who entered the United States in 1909, and was a voluntary member of the Communist Party of the United States from 1937 to 1939. To establish Communist Party membership, the Government produced two witnesses who each testified that they had seen the respondent pay Communist Party dues. The record reveals that Goverment witness Knipe testified untruthfully in this proceeding and perhaps others concern-

ing his record of convictions. While his credibility is weakened by this incident, his testimony as to the respondent's membership in the Communist Party is corroborated by another Government witness whose credibility is unimpeached; and the fact remains that the respondent has [fol. 128h] not denied the correctness of Knipe's testimony concerning membership in the Communist Party. Even using his testimony in an accumulative sense only, we find the record establishes the ground of deportability by reasonable, substantial and probative evidence.

Questions as to the constitutionality of the law are outside the scope of this Board's authority (*Matter of L-*, Int. Dec. 334). The appeal will be dismissed.

Order: It is ordered that the appeal be and the same is hereby dismissed.

Leigh L. (Illegible), Acting Chairman.

[fol. 128i]

U. S. Department of Justice

Board of Immigration Appeals

File: A-5085301—Seattle

In the Matter of

Willia Niukkanen or William Niukkanen or William Albert Mackie

In Deportation Proceedings

In Behalf of Respondent: Sidney I. Lezak, Esquire, 1130 S.W. Third Avenue, Portland 4, Oregon.

Deportable: Act of 1918—Member of Communist Party of the United States.

Motion to Reopen Proceedings.

Opinion—November 29, 1954

The alien's appeal from the order of the special inquiry officer requiring his deportation was dismissed by this Board on September 8, 1953. We found that the record

established that the respondent had been a voluntary member of the Communist Party of the United States from 1937 to 1939. Respondent did not testify on the issue of membership in the Communist Party. He was given an opportunity to apply for discretionary relief, but did not do so. This motion is now made for reopening of proceedings to enable the respondent to apply for suspension of deportation. Accompanying the motion is an affidavit from the respondent outlining the hardship which his deportation would cause his family and stating that he is loyal to the constitution of the United States and to the principles of democracy. There is no expressed disavowal of membership in a subversive organization within the past ten years nor has evidence of such a nature been presented. We have previously decided that under such circumstances, a motion to reopen should not be granted (*Matter of P-*, Int. Dec. 598). This motion will be denied.

Order: It is ordered that the motion be and the same is hereby denied.

Thos. G. Finucane, Chairman.

[fol. 128j]

U. S. Department of Justice

Board of Immigration Appeals

File: A-5085301—Seattle

In the Matter of

Willia Niukkanen or William Niukkanen or William Albert Mackie

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In Deportation Proceedings

In Behalf of Respondent: Nels Peterson, Esquire, 901 Loyalty Building, Portland 4, Oregon.

Opinion—December 23, 1954

This case comes forward pursuant to counsel's motion dated December 9, 1954, requesting the withdrawal of the outstanding order and warrant of deportation and further

requesting that the hearing be reopened for the purpose of affording the respondent an opportunity to apply for and prosecute an application for suspension of deportation under the provisions of section 244(a)(5) of the Immigration and Nationality Act of 1952.

The respondent, a 45-year-old married male, native and citizen of Finland, has resided continuously in the United States since his admission for permanent residence when he was one year of age at Sault Ste. Marie, Michigan on September 5, 1909. The remaining facts in this case have been heretofore fully covered and need no further discussion herein.

Attached to counsel's motion are several documents, the contents of which are self-explanatory and need not be discussed further herein. The respondent in an affidavit subscribed and sworn to on December 9, 1954 deposes that he has not been a member of any subversive organization within the past 10 years and in support thereof further deposed that he was a member of four organizations during this period that have never been linked with any subversive or proscribed organizations.

Upon full consideration of all the evidence of record and counsel's representations by brief on motion as well as the documents submitted in support thereof, we will direct that the outstanding order and warrant of deportation be withdrawn and the hearing reopened for the purpose of affording the respondent an opportunity to apply for and prosecute an application for suspension of deportation under section 244(a)(5) of the Immigration and Nationality Act of 1952. Accordingly, the following order will be entered.

[fol. 128k] Order: It is ordered that the outstanding order and warrant of deportation be withdrawn and the hearing reopened for the purposes set forth in the foregoing opinion.

Thos. G. Finucane, Chairman.

[fol. 132]

BEFORE THE
IMMIGRATION AND NATURALIZATION SERVICE
UNITED STATES DEPARTMENT OF JUSTICE
Portland 5, Oregon

File: A-5 085 301

TRANSCRIPT OF REOPENED HEARING

Date:	February 2, 1955
Time:	9:30 AM
Place:	Portland, Oregon
Special Inquiry Officer:	Louis C. Hafferman
Examining Officer:	John W. Wilson
Stenographer:	Leona L. Brown
Respondent:	William Albert Mackie
Alien's Representative:	Nels Peterson, Attorney at Law
Language Used:	English

* * * * * * *

[fol. 184] Counsel to Respondent:

Q. Now, Mr. Mackie, you have been sworn. You understand that any false statement you make is punishable under the laws of the United States. You understand that?

A. Yes.

* * * * * * *

[fol. 199] Q. Now did you know a man whose name is Lee Knipe?

A. Yes.

Q. When did you first ever see him?

A. Well, it is hard to say when I first saw him. I saw him a lot of times during depression days, but I can't tell you when I first met him.

Q. Approximately how many times did you see him?

A. Maybe 150 times. I don't know.

Q. Was he identified as far as you knew in any partic-

ular capacity as any officer or superior or official of any organization or group?

A. Well, I don't remember. I don't really know.

* * * * * * *

[fol. 200] Q. Do you know whether or not he had anything to do as an officer in the Unemployed Federation?

A. I don't know that.

Q. Do you know whether or not he had anything to do with the Workers Alliance?

A. Yes.

Q. What did he have to do with that?

A. Well, that's where I saw him. I don't know whether you call it Unemployed Council or Workers Alliance or what, but we used to get together and hold dances and raise funds and help get relief for different people in town, and I met him many times. That's how I got acquainted with him from the Unemployed—

Q. In the Finnish Hall or anywhere else did you attend Communist Party meetings?

A. Well, if I said yes and if I said no maybe I wouldn't be telling the truth, because I really couldn't tell one way or the other. I went to meetings there. Sometimes maybe they were Communist, and maybe they wasn't. It could have been and maybe they wasn't.

Q. Did you know then or do you know now whether Lee Knipe was a member of the Communist Party or had any office in the Communist Party, either one?

A. Well, it is hard to say. I don't know, but I am not sure of that. I don't want to make a definite statement.

Q. Don't you know as you sit there in the witness chair now, or have you ever known? Answer either way.

A. Known what?

Q. That Lee Knipe was a member of the Communist Party?

A. I don't know. No, I don't know that.

Q. Have you ever known whether he was or was not?

A. Well, in those days things went around and around and you get one man belonged to the Communist Party and

somebody else—a person didn't know whether they did or didn't. It is hard to say.

Q. Did you know a man by the name of Walter Robert Patrick Wilmot?

A. No, I didn't.

Q. You heard a Walter Robert Patrick Wilmot testify in this proceeding, did you not?

A. Yes.

Q. Can you say on your oath whether or not you have seen that man before?

A. I never saw the man in my life and I don't think he ever saw me in his life.

• • • • • • •

[fol. 201] Q. Now, Mr. Mackie, you at the time of the deportation proceedings brought against you, did not take the witness stand to testify in your own behalf. Now would you explain why?

A. Well, the main reason was on account of the witnesses. I figured I won't have a chance if I said yes or if I said no or what I said when the man gets on the witness stand against me, a man I don't even know, and I know he has never seen me in his life, gets up there and lies against me. What chance would I have? That was the main reason I didn't say anything.

Q. Now Mr. Mackie, Mr. Hafferman wants me to inquire, I assume, as to your knowledge or understanding of the Communist movement. Will you tell us what your understanding of the Communist movement is?

A. I wouldn't want to even try to explain it. I don't know.

Q. Have you read any books written by Karl Marx?

A. Not that I can remember.

Q. Have you read any books on Socialism?

A. I am a very poor reader. I don't read too much. My reading mostly concerns sport magazines, outdoor life, and I never did read much on the political side of things.

[fol. 202] Q. Do you read the daily newspapers?

A. Yes.

Q. In Portland, Oregon?
A. Yes.
Q. Do you subscribe to any?
A. Journal, yes.
Q. Do you subscribe to both of them?
A. Yes.
Q. Have you ever read the book entitled "Looking Backward" by Edward Bellamy?
A. No, I haven't.
Q. Have you ever read any books by Friedrich Engels?
A. No.
Q. Joseph Stalin?
A. No.
Q. Lenin?
A. No, I don't think so.

• • • • • • •

[fol. 203] Q. Have you ever paid any money to any organization, the Communist Party of Oregon or the United States, or any similar name?
A. I haven't knowingly.
[fol. 204] Q. Have you been a member of the Communist Party of the United States or any branch or affiliate or organization by that name or any similar name?
A. Knowingly, I haven't, no.

• • • • • • •

[fol. 206] Q. Do you know where the ulcer is located?
A. Right here in the stomach.
Q. A duodenal ulcer?
A. Yes.
Q. Have you ever been under the care of a doctor for that condition?
A. The doctor was taking x-rays and he found out accidentally. This doctor happened to run on to it. He said it was in a position you couldn't hardly catch it with an x-ray. I was on a diet there for several months and it helped me out some, but it didn't cure it.
Q. Do you know whether or not there has ever been a perforation of it?
A. It bleeds.

Q. Do you vomit blood?

A. Not lately, but sometimes when I get up in the morning I spit blood.

* * * * * * *

[fol. 207] Hearing resumed 9:15 A.M. Feb. 3, 1955, the same persons present with the exception of stenographer Guido F. Caramella substituting for Leona L. Brown.

* * * * * * *

[fol. 240] Examining Officer to Respondent:

* * * * * * *

Q. Do you believe that membership in the Communist Party now is a lawful political purpose?

A. No. I can't answer questions about that because I don't know. If Congress says it is unlawful, it is unlawful. If it isn't, it isn't. I don't know. If I got the question right, I don't know.

Q. I am not trying to confuse you, Mr. Mackie. I am trying to find out your feelings toward Communism.

A. Naturally I don't—Communism or socialism, I don't care what party it is here or any place else, if it has anything to do with overthrowing the government by force and violence I don't agree with it, no.

Q. What do you understand as the aims of World Communism?

A. Oh, I can't go into that because I don't know anything about it. I can go on and talk and talk and hash it out and probably won't say nothing in two hours.

* * * * * * *

[fol. 240a]

BEFORE THE
IMMIGRATION AND NATURALIZATION SERVICE
UNITED STATES DEPARTMENT OF JUSTICE
Portland, Oregon

File: A-5085301

In re: Willia Niukkanen alias William Niukkanen, now known as William Albert Mackie

In Deportation Proceedings

In Behalf of Respondent: Mr. Nels Peterson, Attorney at Law, Loyalty Building, Portland 4, Oregon

Charges:

Warrant: Act of 1918—Member of Communist Party of the United States after entry

Lodged: None

Application: Suspension of deportation under Sec. 244 (a)(5), I&N Act.

Detention Status: Released under $2000 court bond pending disposition of petition for writ of habeas corpus

Warrant of Arrest Served: September 12, 1952

OPINION—February 16, 1955

Discussion: The record relates to a 46-year-old married male, a native and citizen of Finland, who has resided continuously within the United States since his admission for permanent residence at Sault Ste. Marie, Michigan, on September 5, 1909. He was found deportable on the charge contained in the warrant of arrest, as above set forth, in an order dated June 30, 1953. His appeal therefrom was dismissed by the Board of Immigration Appeals in its order of September 28, 1953. A motion to reopen the proceedings, when deportation was imminent, to file an application for suspension of deportation was filed on December 10, 1954, and granted December 23, 1954. A prior motion to reopen was denied on November 29, 1954, ap-

parently on the ground that there had been no disavowal of membership in a subversive organization for the past ten years.

The findings of fact and conclusion of law as set forth in the decision of June 30, 1953, will not be disturbed, nor is there any reason for so doing. It has been administratively held that an alien who has been found deportable under the Act of October 16, 1918, as amended, by reason of having been a member of the Communist Party of the United States after entry may apply for suspension of deportation under Section 244(a)(5), Immigration and [fol. 240b] Nationality Act, such ground for deportation under the prior law having been carried over into the 1952 Act. *In the Matter of D-*, Int. Dec. #641, BIA 8/27/54.

The alien was lawfully married to a native-born citizen of the United States on June 24, 1945. There are no children as the issue of such marriage. His spouse has a son by a former marriage, aged 12 years, a native-born citizen. Her prior marriage was lawfully terminated by divorce on November 22, 1944. The child being his stepson may be regarded as his child also under Section 101(b)(1)(B), Immigration and Nationality Act, and will for that reason hereafter be so referred to. The alien in his application (Ex. 7) also lists his parents, aged about 78 and 80 years, as persons who would be affected should he be deported. Both are natives of Finland, they having accompanied him to this country and have not acquired United States citizenship. Although the father did not testify in these proceedings, his mother did and her testimony shows that at the most his deportation may result in an emotional or mental stress, which it is doubtful could be regarded as being of an unusual and extreme hardship. Inasmuch as they have their own income and are not financially dependent for support upon him they will be disregarded insofar as the application is concerned.

The applicant for the past few years has been employed as a painter. His earnings for the past year amounted to about $4000, which he has estimated has been his average yearly income over a period of about ten years. His wife is not presently employed. During the time they have been married she has worked off and on for a total of about

30 months as a waitress and laundry worker. The alien has not been employed for the past few weeks, which could be attributed to the season of the year. They purchased a home in 1946 for $3100, which presently is valued at between $6000 and $6500 and on which there is an outstanding mortgage of about $2500. The value of their home furnishings and personal property, including an automobile, is estimated at about $2000. They have no other assets.

The evidence of record shows that the respondent has lived uninterruptedly within the United States for a period in excess of the last ten years; that he has not been arrested and/or convicted of an offense which would adversely affect good moral character since 1930, at which time he was convicted of having stolen four chickens, which may be regarded as a petty offense. Witnesses have been produced, not related to the alien, citizens of the United States, who have known him during the statutory period for which good moral character is required, who testified that he has been regarded as a person of good repute and moral character. Their testimony in this respect is regarded as credible. Although a final order of deportation in this case had [fol. 240c] been entered, it was not issued on a charge contained in the Immigration and Nationality Act. On the basis of the record it has been satisfactorily established that the alien's deportation would result in exceptional and extremely unusual hardship to him, his spouse and child, the latter two citizens of the United States.

Whether or not the relief sought should be granted is an administrative discretionary matter. If the application is granted a complete and detailed statement of the facts and pertinent provisions of the law in the case must be reported to the Congress with the reasons for such suspension in accordance with Section 244(c), Immigration and Nationality Act. The Senate and the House must by resolution favor the suspension of deportation, otherwise the alien must be deported.

In the instant case there are factors which merit consideration and because thereof the respondent was informed of the provisions of Section 244(a)(5) at the proceedings had in 1953. The fact that he did not then avail himself of the benefits provided in the statute and his refusal to tes-

tify at that time will not be held in any way to jeopardize the pending application. It was believed at that time that he made a mistake, but it was a matter that he himself had to decide. The only matters which will be now considered are those which may in any way affect the application on the basis of the reopened proceedings, for which the hearing was reopened, and determine therefrom whether suspension of deportation is justified.

The alien has lived within the United States since the age of ten months or for the past forty-five years. He had service in the U. S. Army for three months in 1941, or prior to the time the United States declared war on December 8, 1941, was transferred to the Inactive Enlisted Reserve Corps, was recalled for three days in February, 1942, and transferred to the Enlisted Reserve Corps and was discharged without further duty on June 8, 1945, his honorable discharge certificate showing that he was separated for "convenience of the Government". There has been no arrest in his case of a serious nature. In addition to his spouse, his child and parents he has two sisters in this country. Should he depart from the United States he would not be eligible to return under Section 212(a)(28), Immigration and Nationality Act.

The demeanor of the alien at the 1953 proceedings and at these proceedings to determine his eligibility for suspension of deportation leaves no doubt that he was a voluntary member of the Communist Party during at least the years 1937-1939. There is no evidence in the record to indicate that he has been a member of the Communist Party after he left Portland in about 1939 for Eastern Oregon. At the reopened hearing the alien was evasive as to his activities during the period between 1930 and 1940, particularly as to whether or not he had been a member of the Communist Party (pp. 195-204).

[fol. 240d] On direct examination by counsel for alien, the respondent testified (p. 200):

> "Q. In the Finnish Hall or anywhere else did you attend Communist Party meetings?
>
> A. Well, if I said yes and if I said no maybe I wouldn't be telling the truth, because I really couldn't

tell one way or the other. I went to meetings there. Sometimes maybe they were Communist, and maybe they wasn't. It could have been and maybe they wasn't."

At page 204 on direct examination the following testimony appears:

"Q. Have you been a member of the Communist Party of the United States or any branch or affiliate or organization by that name of similar name?

A. Knowingly, I haven't, no.

Q. Any time in your lifetime, from the time you were born until today (as) you are sitting in the witness stand.

A. Not knowingly."

When an alien is deportable on a so-called subversive charge, it has been the policy if he is otherwise statutorily eligible not to grant suspension of deportation unless it has been established that he has made a clean break with the Communist Party or any organization which may be subversive in nature, that he is no longer sympathetic to the Communist principles and is in fact actively opposed to the Communist ideologies. In the instant case the respondent is what may be well described as a reticent individual as to his beliefs. This conclusion is borne out not only by his demeanor during the proceedings but by the testimony of his own witnesses, including his wife. *In the Matter of R-*, Int. Dec. #644, BIA 9/10/54, an appeal from an order denying suspension of deportation was dismissed as the evidence of record in that case did not establish that the appellant was no longer sympathetic to Communist principles, he having terminated his membership in 1935 in the Communist Party. In the instant case it is somewhat questionable whether he has ever to any extent perceived the intricate machinations of the Communist Party and principles of communism. He may be regarded as a follower and not a leader. Although there is no doubt that the respondent was in fact a member of the Communist Party, he is not going to admit that he was disillusioned. His attitude is fairly well expressed in his own words when he was questioned by the Examining Officer for the Govern-

ment as to recent activities or connections with two organizations, whose aims or activities are questionable, especially as to what persons were present at a certain meeting (pp. 217-218), the testimony being as follows:

> "Q. Do you recall who was there?
> A. Do I have to answer that? (Inquires of counsel). I don't want to come out here and give a lot of names and you go and inquire about it, and make a person think I am trying to act as a "stool pigeon". That is one thing I don't want to do.".

[fol. 240e] If he has made a clean break with the Communist Party, there is no reason why he should be any more reluctant to testify about activities within the Party or any questionable organization than he would be to furnish information while a boy scout, his employment or any other bona fide activity. It is apparent that the alien has been and is going to be extremely careful so as to avoid giving testimony which could result in the implication of some other person who may to him be known as a member or former member of the Communist Party so as to avoid being labeled a "stool pigeon", nor is going to give testimony which would indicate or infer that he has been disillusioned or is opposed to Communism. The witnesses presented by him in no way appear to have ever had any connection with what may be regarded as a subversive organization and each one, including his wife, has testified that he has never discussed matters which may be regarded as political.

It is significant to note that after the respondent was found deportable that he turned for aid and comfort to an organization known as the Oregon Committee for the Protection of Foreign Born. Whether such organization is in any way linked with the American Committee for the Protection of Foreign Born, which has been cited by the Attorney General as disloyal, has not been established in these proceedings. The purpose of the former organization is questionable. He has also completed and submitted an application for membership in the Methodist Federation for Social Action. The latter organization has been re-

ferred to by the California Senate Committee on Un-American Activities in its report for 1948 at page 73 as one of the more conspicuous fronts for Communist activity in the field of relief, assistance and welfare work, and dealing with problems of the unemployed and underprivileged.

What the alien intended to accomplish by turning to either organization as referred to above for solace when he was represented by able counsel is somewhat difficult to understand. He has alleged, however, that at the meetings which he has attended discussions were had about attempting to repeal the Immigration and Nationality Act, which he denounces although he seeks relief thereunder.

It is also worthy of note that the alien testified that he could not recall the name of any person—other than the witness Knipe—with whom he attended any meeting during the 1930-1940 era. He had no difficulty in recalling the name of his scout master between 1921 and 1928 (p. 195). His testimony shows he has always while in Portland, Oregon, lived in that area of the city within which the Finnish Hall and the Albina District are located.

The alien's testimony that he does not recall or denial [fol. 240f] of membership in the Communist Party is not credible. His attitude being what it is, the case does not merit the granting of suspension of deportation. His application therefor will be denied.

Order: It Is Ordered that the alien's application for suspension of deportation be denied.

It Is Further Ordered that the alien be deported from the United States in the manner provided by law on the charge contained in the warrant of arrest.

Louis C. Hafferman, Special Inquiry Officer.

[fol. 240g]

U. S. Department of Justice

Board of Immigration Appeals

File: A-5085301

In re: Willia Niukkanen or William Niukkanen now known as William Albert Mackie

In Deportation Proceedings

In Behalf of Respondent: Nels Peterson, Esquire, Loyalty Building, Portland 4, Oregon

Charges:

Warrant: Act of 1918—Member of Communist Party of the United States after entry

Lodged: None

Application: Suspension of deportation—Section 244(a)(5), I&N Act

Detention Status: Released under $2000 bond

Opinion—May 13, 1955

This case comes forward on appeal from an order entered by the Special Inquiry Officer on February 16, 1955, denying the respondent's application requesting that his deportation be suspended under the provisions of Section 244(a)(5), Immigration and Nationality Act of 1952, and directing that he be deported from the United States pursuant to law on the charge stated in the warrant of arrest. On examination of the record we find that the warrant for the respondent's arrest was issued and served upon him on June 17 and September 12, 1952, respectively.

This case first came before this Board on September 8, 1953, at which time we dismissed the appeal from an order entered by the Special Inquiry Officer on June 30, 1953, directing that respondent be deported from the United States pursuant to law on the charge stated in the warrant of arrest.

Thereafter, on November 29, 1954, we denied counsel's motion requesting that the proceedings be reopened for the purpose of affording respondent an opportunity to apply for suspension of deportation under the Immigration and Nationality Act of 1952. In our decision of November 29, 1954, we affirmed our previous finding that respondent had been a voluntary member of the Communist Party of the United States from 1937 to 1939 and commented that he did not testify on the issue of membership in the Communist Party during the hearing conducted on the warrant of arrest.

[fol. 240h] When this case was last before us on December 23, 1954, we directed the withdrawal of the outstanding order and warrant of deportation and further directed that the hearing be reopened for the purpose of affording respondent an opportunity to apply for and prosecute an application for suspension of deportation under the provisions of Section 244(a)(5) of the Immigration and Nationality Act of 1952.

Respondent, a 46-year-old married male, native and citizen of Finland, has resided continuously in the United States since his admission for permanent residence at Sault Ste. Marie, Michigan, on September 5, 1909. Respondent was lawfully married to a native-born citizen of the United States on June 24, 1945, at Portland, Oregon.

During the hearings conducted under the warrant of arrest on May 11 and May 21, 1953, two Government witnesses testified that the respondent was a voluntary member of the Communist Party of the United States from 1937 to 1939. These witnesses each testified that they had seen the respondent pay Communist Party dues. Likewise, testimony of the witness Wilmot revealed that the respondent attended closed meetings of the Communist Party in Portland, Oregon, and in Aberdeen, Washington. The record shows that the other Government witness Knipe testified untruthfully during the aforementioned hearing concerning his record of convictions, thereby lessening his credibility as a witness. However, testimony of the witness Knipe as to respondent's membership in the Communist Party, Portland Section, is corroborated by the Government wit-

ness Wilmot, who has been a credible and truthworthy witness in this proceeding.

The respondent did not testify during the aforementioned hearings on the issue of whether he had or had not been a member of the Communist Party of the United States. During the original hearings he was afforded an opportunity to make application for discretionary relief but failed to do so. The evidence of record clearly establishes that respondent is subject to deportation on the charge stated in the warrant issued for his arrest on June 17, 1952.

The respondent testified during the reopened hearings conducted at Portland, Oregon, on February 2 and 3, 1955, that he was a member of the Workers Alliance for approximately two years prior to his departure for Eastern Oregon during the year 1939. The Workers Alliance is an organization noted in the list prepared by the Attorney General, after appropriate investigation and determination, as a Communist Party affiliate. It was so designated as such on May 27, 1948, and the information with respect thereto was disseminated on June 1, 1948 (13 F.R. 3067). [fol. 240i] The respondent's citizen wife and his mother testified during the reopened hearing that they had never known or heard respondent talk about or discuss Communism. It is conceded that his deportation would result in serious economic detriment to his citizen spouse and her minor citizen child, issue of a prior marriage. Likewise, it is conceded that no evidence has been produced to show that the respondent has been a member of the Communist Party since leaving Portland, Oregon, for Eastern Oregon, during the year 1939. However, his testimony during the reopened hearing was evasive and unresponsive with respect to his activities both prior and subsequent to 1940. Under the applicable regulations the respondent has the burden of establishing that he meets the statutory requirements for the relief of suspension of deportation (8 CFR 242.54(d)).

Respondent testified that he attended meetings in the Finnish hall in the Albina section of Portland, Oregon, but did not know whether they were Communist Party meetings or not and that perhaps there were Communists

present at these meetings. When asked if there were Communists present, he answered "Maybe there were Communists there and maybe there wasn't." Notwithstanding the testimony of the two witnesses who appeared on behalf of the Government during the original hearing conducted under the warrant of arrest, and his own testimony in this proceeding that he was a member of the Workers Alliance, the respondent testified that he had never knowingly been a member of the Communist Party of the United States or of any branch, affiliate or organization of the Communist Party of the United States. He further testified that he did not knowingly at any time in his life become a member or affiliated with the Communist Party of the United States. When asked if he recalled who was present at the turkey dinner meeting of the Oregon Committee for the Protection of the Foreign Born, held in the Finn hall in November 1954, he answered, "Do I have to answer that? * * * And make a person think I'm trying to act as a stool pigeon. That is one thing I don't want to do."

The remaining facts in this case have been heretofore fully covered by the Special Inquiry Officer and need no further discussion herein.

Counsel's assertion that there is no legal, reasonable or proper grounds for the Special Inquiry Officer's denial of respondent's application requesting that his deportation be suspended under the provisions of Section 244(a)(5) of the Immigration and Nationality Act of 1952, is without merit. The evidence of record clearly establishes that the respondent was a member of the Communist Party from 1937 until his departure from Portland, Oregon, to Eastern Oregon in 1939. During the reopened hearing he testified that he was a member of a group that was probably the Workers Alliance, an organization designated by the Attorney General of the United States as being Communist. [fol. 240j] As hereinbefore stated, the respondent's testimony during the reopened hearing was evasive and unresponsive to most, if not all, of the questions asked of him with respect to the Communist Party and his being a member thereof. He refused to name the six, eight or maybe ten persons that were present at the Turkey Dinner meeting of the Oregon Committee for the Protection of Foreign

Born held at the Finnish hall in November 1954. While it has not been established that this latter organization is Communist or an affiliate of the Communist Party, the respondent steadfastly refused to name the persons that were present at that meeting. Likewise, the respondent failed to submit any evidence showing that he is actively opposed to the doctrines and teachings of the Communist Party. While the respondent's answers to questions concerning his activities both prior and subsequent to 1940 as well as the meetings attended by him are for the most part vague and unresponsive, it is noted that his recollection of places, persons and events prior to 1930 is good.

After carefully considering all the evidence of record together with the exceptions noted by counsel on appeal, we find nothing therein that warrants any change being made in the decision of the Special Inquiry Officer who has denied respondent's application requesting that his deportation be suspended under the provisions of Section 244(a)(5), Immigration and Nationality Act, and has directed that he be deported from the United States pursuant to law on the charge stated in the warrant of arrest. The evidence of record, which is based primarily upon the testimony of the respondent, does not establish that he, the respondent, has completely severed his connection with the Communist Party of the United States and that he is no longer sympathetic to its aims or principles. There is an overwhelming amount of evidence to show that respondent was a member of the Communist Party of the United States from 1937 until early in the year 1939. There is nothing in the record to show that respondent has completely disassociated himself with the Communist Party and that he no longer believes in its doctrines or principles. For the reasons hereinbefore set forth, the following order will be entered.

Order: It is ordered that the appeal be dismissed.

Thos. G. Finucane, Chairman.

[fol. 240k]

UNITED STATES DEPARTMENT OF JUSTICE

BOARD OF IMMIGRATION APPEALS

File: A-5085301—Portland, Oregon

In re: Willia Niukkanen aka William Niukkanen now known as William Albert Mackie

In Deportation Proceedings

Motion

On Behalf of Respondent: Gerald H. Robinson, Esquire, Failing Building, Portland 4, Oregon, and Nels Peterson, Esquire, 901 Loyalty Building, Portland 4, Oregon

Charges:

Warrant: Act of October 16, 1918, as amended (former 8 USC 137)—Member of the Communist Party of the United States after entry.

Lodged: None.

Application: Reopening

OPINION—March 26, 1958

On September 8, 1953 this Board dismissed the appeal from a special inquiry officer's order of June 30, 1953 directing the respondent's deportation from the United States pursuant to law on the charge stated in the warrant of arrest. On November 29, 1954 we denied a motion for reopening of the proceedings to afford the respondent an opportunity to apply for suspension of deportation under the Immigration and Nationality Act of 1952, but on December 23, 1954 we ordered the outstanding order and warrant of deportation in the case withdrawn and the proceedings reopened to afford the respondent an opportunity to apply for and prosecute an application for suspension of deportation under Section 244(a)(5) of the Immigration [fol. 240l] and Nationality Act (8 USC 1254). On May 13, 1955 we dismissed the appeal from a special inquiry officer's order of February 16, 1955 denying the respondent's application for suspension of deportation under Section

244(a)(5), and directing that he be deported from the United States pursuant to law on the charge stated in the warrant of arrest. The case is now again before us on motion for reopening of the proceedings for reconsideration of the issue of deportability. The motion will be denied.

The respondent is a 49-year-old male alien, a native and citizen of Finland, who has resided continuously in the United States since his admission for permanent residence at Sault Ste. Marie, Michigan, on September 5, 1909. He was lawfully married to a native-born citizen of the United States on June 24, 1945, at Portland, Oregon. He has a minor stepson who is a native-born citizen of the United States.

The respondent stands ordered deported on the basis of a finding that he was a member of the Communist Party of the United States from 1937 to 1939. The present motion is based on a decision of the Supreme Court of the United States in the case of *Rowoldt* v. *Perfetto* (355 U.S. 115; 2 L. Ed. (2d) 140), rendered on December 9, 1957, which was subsequent to the entry of the last order in this case. The claim is that said decision redefines the evidential and substantial requirements of membership in the Communist Party as a basis of deportability, so as to take the respondent out of the class of deportable aliens.

At the original hearings, two former members of the Communist Party testified that they knew the respondent as a member of that Party from 1937 to 1939. One of the witnesses testified that the respondent was a card-carrying and dues-paying member of the Communist Party and a functionary (secretary, he believed) of the Albina Group. He also testified that he had attended a Communist Party meeting called a plenum, in Aberdeen, where the respondent was present; and that this meeting was to report work done by the people of the Northwest. He further testified that the respondent had attended meetings in which everything that dealt with the Party was discussed, including policy, and that the respondent took part in these discussions. He finally testified that in his opinion the respondent was not an ordinary Communist but a high official in the Party. [fol. 240m] The second Government witness' credibility was lessened because of his untruthful testimony as to his

record of convictions, but his testimony was corroborated by the first Government witness. He likewise testified that he had seen the respondent pay Communist Party dues. He also testified that he attended 30 to 35 closed Communist Party meetings with the respondent. He also testified that the respondent served on the executive board of the branch of the Party of which the witness was a member.

The respondent did not testify at the original hearings, the ones at which the witnesses referred to above testified. However, he did testify in the course of the hearings reopened for the purpose of taking testimony on his application for suspension of deportation. He admitted attending meetings in the Finnish hall in the Albina section of Portland, Oregon, but claimed ignorance as to whether they were Communist Party meetings. He also testified that he was a member of the Workers Alliance, an organization designated by the Attorney General of the United States as being a Communist organization. His testimony was evasive and unresponsive to most, if not all, of the questions asked with respect to his membership in the Communist Party. In addition, his answers to questions concerning his activities both prior and subsequent to 1940, as well as to the meetings attended by him, were vague and unresponsive, but his recollection of places, persons and events prior to 1930 was good.

Careful reconsideration of the entire record reveals an overwhelming amount of evidence showing that the respondent was a member of the Communist Party of the United States from 1937 until early in the year 1939, and that such membership on his part was a meaningful association and one which was not wholly devoid of political implications. But this is the precise test for deportability laid down by the Supreme Court in the case of *Rowoldt* v. *Perfetto* (supra). In addition, eight days after considering that case, the Supreme Court refused to review the deportation case of this respondent. (*Niukkanen* v. *Boyd,* cert. den., 12/16/57; 2 L. Ed. (2d) 259.) Accordingly, the present motion will be denied.

[fol. 240n] Order: It is ordered that the motion be and the same is hereby denied.

Thos. G. Finucane, Chairman.

FILED
JUN 20 1959
JAMES R. BROWNING, Clerk

In the Supreme Court

of the United States

OCTOBER TERM, 1958

NO. [redacted] 130

WILLIA NIUKKANEN, also known as WILLIAM NIUKKANEN, also known as WILLIAM ALBERT MACKIE,

Petitioner,

v.

EUGENE D. McALEXANDER, Acting District Director, District 31, Immigation and Naturalization Service,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REUBEN LENSKE,
Portland, Oregon,
Attorney for Petitioner.

Of Counsel:

NELS PETERSON,
901 Loyalty Building,
Portland 4, Oregon,

GERALD H. ROBINSON,
1006 Failing Building,
Portland 4, Oregon.

STEVENS-NESS LAW PUB. CO., PORTLAND, ORE. 6-59

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In the Supreme Court

of the United States

OCTOBER TERM, 1958

NO.

WILLIA NIUKKANEN, also known as WILLIAM NIUKKANEN, also known as WILLIAM ALBERT MACKIE,

Petitioner,

v.

EUGENE D. McALEXANDER, Acting District Director, District 31, Immigation and Naturalization Service,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

To the Honorable, the Chief Justice of the United States, and the Honorable Associate Justices of the Supreme Court of the United States:

Petitioner, Willia Niukkanen, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on the 6th day of April, 1959.

CITATION TO OPINIONS BELOW

The oral opinion of the United States District Court for the District of Oregon was rendered on the 14th day of April, 1958, and appears at page 81 of the Record. The opinion of the United States Court of Appeals for the Ninth Circuit is dated April 6, 1959, and is unreported at this time. The opinion of the Court of Appeals is included as Appendix I to this Petition.

JURISDICTION

The judgment of the Court of Appeals was entered on April 6, 1959. A petition for rehearing was timely filed and was denied on May 19, 1959. The jurisdiction of this Court is invoked under 28 USC 1254(1).

QUESTIONS PRESENTED

Petitioner was born in Finland in 1908 and entered this country less than a year later. He has been ordered deported on the ground that he allegedly was a member of the Communist Party of the United States during the years 1937-39. His application for suspension of deportation was denied by the Board of Immigation Appeals. On a previous proceeding testing the validity of the Government's refusal to suspend deportation, whether or not there was reasonable, substantial and probative evidence that Petitioner was a member of the Communist Party within the meaning of *Galvan v. Press*, 347 U.S. 522, and whether or not the Act under

which the Government seeks to deport Petitioner, 8 USC 1251 (a) (6) (C) is a violation of the Constitution of the United States, the deportation orders were sustained. 148 Fed. Supp. 106, 241 Fed. (2d) 938, certiorari denied December 16, 1957, 355 U.S. 905, 2 Lawyers Ed. (2d) 259.

The questions presented in this Petition are:

1. Whether 8 USC 1251 (a) (6) (C) violates the Constitution of the United States by reason of

(a) being a Bill of Attainder;

(b) being an Ex Post Facto law;

(c) violating Due Process of Law; and

(d) infringing on freedom of speech.

2. Whether the Petitioner's alleged association with the Communist Party, on the record of this case, was "meaningful" and "political" within the rule of *Rowoldt v. Perfetto,* 355 U.S. 115.

STATUTES INVOLVED

8 USC 1251 (a) (6) (C), and 1252 (b) (4), insofar as relevant here, read as follows:

> Sec. 1251 (a) (6 (C): "Any alien in the United States . . . shall, upon the order of the Attorney General, be deported who . . . is or at any time has been, after entry, a member of any of the following classes of aliens:
>
> ". . . aliens who are members of or affiliated with (i) the Communist Party of the United States . . ."
>
> Sec. 1252 (b) (4): ". . . no decision of deportability shall be valid unless it is based upon reasonable, substantial and probative evidence."

STATEMENT OF THE CASE

The jurisdiction of the United States District Court for the District of Oregon was invoked under Title 28, USC, Section 2241, 62 Stat. 964, and Title 5, USC, Section 1009, 60 Stat. 237.

Petitioner* and his parents have resided in the United States since 1909 and in Portland, Oregon for about 33 years where Petitioner is a house painter.

Petitioner is the only surviving son of his parents, a brother having been killed during World War II on a ship near Wake Island (R. 172). He was drafted in 1944 and served 95 days in the Army, and received an Honorable Discharge for medical reasons (Tr. 8, 9).

On June 17, 1952, a warrant for the arrest and deportation of Petitioner was issued by the Immigation Service and was served upon him on or about September 12, 1952. In the warrant, it was alleged that Petitioner was a member of the Communist Party after entry into the United States from 1937 to 1939.

The Government's case was based upon testimony of two witnesses, Walter R. P. Wilmot and Lee Arthur Knipe. The Board of Immigration Appeals discounted the testimony of Knipe because he had lied during the hearing and at other deportation hearings by denying a prior criminal conviction in California. Wilmot admitted that at the time Petitioner was alleged to be a Communist, he himself was a very heavy drinker.

---

* The transcript of the hearings before the Immigation Office will be referred to as "(Tr. .....)", and the record made in the District Court will be referred to as "(R. .....)".

Petitioner did not testify at the deportation hearing but on the hearing of his application for suspension of deportation, he denied that he was a Communist Party member at any time (Tr. 203, 204).

Besides the Constitutional questions, the issue in this case is whether the testimony of Wilmot and Knipe is (a) believable, and (b) if it is creditable, whether it establishes that Petitioner was more than a nominal member of the Communist Party and had a "meaningful association" not wholly devoid of "political implications", within the meaning of *Rowoldt v. Perfetto,* 355 U.S. 115.

REASONS FOR GRANTING THE WRIT

1. The Statute Under Which Petition was Ordered Deported is Unconstitutional.

Petitioner recognizes that the holdings of this Court in *Galvan v. Press,* 347 U.S. 522, and *Harisiades v. Shaughnessy,* 342 U.S. 580, sustained the Act in question against the contention that it is an ex *post facto* law and in violation of due process of law.

Petitioner also notes, however, that at no time has this Court passed upon the question of whether the Act is a bill of attainder. This Court, in striking down state legislation as bills of attainder in the cases of *Cummings v. Missouri,* 4 Wall. 277, and *Ex Parte Garland,* 4 Wall. 333, define the character and purpose of a bill of attainder and the nature of the evil enjoined by the Constitution.

In the more recent case of *U.S. v. Lovett,* 328 U.S. 303, the Supreme Court further clarified its earlier opinions of this type of legislation. It said:

> "They [the Cummings and Garland cases] stand for the proposition that the legislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without judicial trial are bills of attainder prohibited by the Constitution." (328 U.S. at 305)

Section 1251 (a) (6) (C) possesses all the attributes of a bill of attainder described in the above three cases. It outlaws by legislative fiat the individuals of a named and ascertainable group, namely, members of the Communist Party, and inflicts punishment and penalties upon them without judicial trial.

The Constitutional injunction against bills of attainder applies alike to aliens and citizens. The Court has repeatedly declared that an alien lawfully here is entitled to the same constitutional safeguards as a citizen. *Lem Moon Sing v. United States,* 158 U.S. 538, 547; *Wong Wing v. United States,* 163 U.S. 228, 238; *Yick Wo v. Hopkins,* 118 U.S. 356, 369.

The framers of the Constitution were not unmindful that bills of attainder had been passed by several states affecting British citizens and banishing them from American territory or confiscating their property. (Sec. 4g, Laws of New York, 1779, Ch. 25; 2 Belknap, History of New Hampshire, 1912). Since bills of attainder against aliens were known before the Constitution, there is no basis for the contention that the prohibition was in-

tended for the benefit of citizens only. The Constitutional prohibition is in fact absolute and qualified. It simply says that no bill of attainder "shall be passed."

There is no merit in the idea that the deportation does not constitute punishment and therefore does not apply to this Petitioner. Petitioner contends that deportation in fact inflicts literal punishment and so constitutes in law a deprivation of rights and privileges. *Bridges v. Wixon,* 326 U.S. 135, 154.

The penalty of deportation which the Government seeks to impose upon Petitioner, according to Mr. Justice Brandeis, will deprive him of "all that makes life worth living." *Ng Fung Ho v. White,* 259 U.S. 276, 284.

Even if deportation is held not to be criminal punishment, aliens are not deprived of the protection of the constitutional prohibition against bills of attainder. On the contrary, legislation imposing no criminal punishment whatsoever has been declared in violation of this section of the Constitution solely because it deprives individuals of various rights, privileges, and salaries. *United States v. Lovett,* 328 U.S. 303; *Ex Parte Garland,* 4 Wall. 333, 337; *Pierce v. Carskadon,* 83 U.S. 234; *Cummings v. Missouri,* 4 Wall. 277.

In the case of *Ex Parte Garland,* supra, the Court stated:

> "The question in this case is not as to the power of Congress to prescribe qualifications but whether the power has been exercised as a means for the infliction of punishment, against the prohibition of the Constitution." 4 Wall. 379-80.

The paucity of cases in United States judicial history declaring legislative acts to be in violation of the Constitutional prohibition against bills of attainder demonstrates that the doctrine has had deep and widespread acceptance by the legislative and executive branches of our Government.

Petitioner submits that the legislation which we here question falls squarely within the time honored principle condemning bills of attainder. We believe that this Court recognizes the brutal nature of the Act in question and its harsh application to this Petitioner. In the final analysis, the Court must be guided by the clear language of the Constitution and this language leaves the Court no choice but to strike down the Act as a bill of attainder.

The strong tide of opinion in some quarters which ran against all persons who were alleged or intimated to have had any Communist connections, no matter how long ago, has subsided. We suggest that after a momentary lapse, sane standards of fairness and good judgment have recovered the initiative in this country and statutes such as the Act in question should now be re-examined with a view to appraising their constitutionality in the cold light of reason free from the impassioned currents of politics. In order to alleviate the suffering of many aliens such as Petitioner, who at no time did or said anything against the interests of this country, but who are unfortunately caught up in the toils of a vicious statute, this Court need not overrule its own precedents in *Galvan* and *Harisiades*.

Having not previously ruled on the question of a bill of attainder it may in this case proceed to examine it and strike down the Act on this ground.

The policy of this Court to exercise a great restraint in constitutional cases is well known; yet against this policy must be placed the urgent need for strict protection of the liberties not only of American citizens but of those who have lawfully made their home here for many years. Not only humane considerations, but the essential structure of our democratic life as embodied in the Bill of Rights cry out for the Court to act and to act now. The plight of Petitioner, who faces deportation to a land he has scarcely known, whose language he does not read, and where he has no friends or family is indeed moving; however, it must be multiplied many times to understand the full magnitude of the harsh application of the Act in question. The continued operation of the law can only be assessed as a brutalizing influence on American life as a whole. Deportation has always been, next to capital punishment, the gravest penalty that could ever be imposed. From the Middle Ages onward it has been viewed as a barbaric practice, and the Constitution, as a rule of law, has as its chief function the elimination of acts which offend the thoughtful soul of man.

If the Court will not re-examine its decisions in *Galvan* and *Harisiades,* then it should at least strike down the Act as a bill of attainder.

2. The Evidence Shows that the Alleged Membership of the Petitioner in the Communist Party was not a Meaningful Political Association Under the Rule of Rowoldt v. Perfetto.

In *Rowoldt v. Perfetto,* 355 U.S. 115, the Supreme Court expanded upon the test laid down in *Galvan v. Press,* supra, by requiring that an order of deportation must be supported by "substantial" proof that an alien had a "meaningful association" "not wholly devoid of political implications".

It is possible to compare the testimony in *Rowoldt* with that in the case at bar and to determine therefrom whether the alleged participation of Petitioner in the Communist Party was more or less "meaningful" than that of the Petitioner in *Rowoldt.*

In *Rowoldt,* it will be recalled that the alien admitted that he was a member of the Communist Party for about a year and that during that time he attended Communist Party meetings and paid membership dues (355 U.S. 116-7). Rowoldt worked in the Communist Party bookstore in which Communist and Marxist literature was sold and he demonstrated a high degree of sophistication concerning Communism and the history of the Russian Revolution (355 U.S. 118, 120, 129-30).

He testified that he joined the Communist Party for economic reasons during the depression (355 U.S. 117-18).

By way of comparison, Petitioner's alleged connection with the Communist Party, which he vigorously

denied at on hearing (Tr. 198, 203, 204, 220; R. 54), amounted only to the attendance at certain Communist Party meetings and the payment of membership dues (Tr. 14, 15, 17, 19, 22, 25, 27, 67 and 69). He also helped circulate the "Labor New Dealer", a C.I.O. newspaper (Tr. 15, 19 and 20).

Petitioner was and apparently still is ignorant of Communist history and theory, even according to a Government witness (Tr. 70, 75, 201, 202; R. 61, 62).

Petitioner's motive for his alleged association with Communism were economic, even according to his accusers.

The Court of Appeals in its decision (p. 7, 8) places considerable stress upon the alleged leadership role of Petitioner, and the testimony that he belonged to what members of the Party called "the top fraction". A close analysis of the testimony indicates that Wilmot testified that he was possibly a "functionary" (Tr. 15) and that he was in the top fraction of the Party (Tr. 27), but he provided no definition of these terms. For all the reader of the record can know, the terms "functionary" and "top fraction" are meaningless.

The witness Knipe, however, denied that Petitioner was a "functionary" (Tr. 68) or that he held any office (Tr. 66, 68) other than a passing reference to his being on the Executive Board of a Branch (Tr. 68). There was no evidence that Petitioner in fact performed any functions as a leader.

Nowhere in the Record is there the slightest bit of evidence that Petitioner, if he was a Communist Party member, was aware or interested in its political, as distinct from its economic and welfare activities.

CONCLUSION

Petitioner believes that this case is an excellent opportunity for this Court to once and for all end the legislative abuse of aliens who have been long-time residents of this country. Petitioner believes it is time to call an end to fanciful red hunting and to return to the elementary standards of American fairness and justice. Because the Court has not yet ruled upon the question of whether the Act is a bill of attainder, it need not overrule its decisions in *Galvan* and *Harisiades* to rid the country of a law that even the District Court describes as "a harsh one" (R. 85). If, however, the Court does not desire to review the constitutional issues at this time, it could dispose of this case in the interests of justice by holding that the evidence presented by the two extremely unreliable witnesses of the Government is inadequate to support the order of deportation.

For the foregoing reasons, the writ should issue.

Respectfully submitted,

REUBEN LENSKE,
Attorney for Petitioner.

APPENDIX I

(Title of Court and Cause)

Appeal from the United States District Court for the District of Oregon

Before: Stephens, Chambers, and Hamley, Circuit Judges

HAMLEY, Circuit Judge:

In this habeas corpus proceeding petitioner seeks to invalidate an order for his deportation as an alien who has been a member of the Communist party. After a hearing in the district court, an order was entered dismissing his application. Petitioner appeals, contending that he was not shown to have a "meaningful" association with the Communist party, as that term is used in Rowoldt v. Perfetto, 355 U. S. 115, 120. He also argues that the act under which he was ordered deported is unconstitutional.[1]

---

[1] The warrant of arrest in the deportation proceedings was issued on June 17, 1952. The statute under which the proceedings were instituted was therefore § 22 of the Internal Security Act of 1950, 64 Stat. 987, 1006 (amending the Act of October 16, 1918, 40 Stat. 1012, as amended) as amended by § 1 of the Act of March 28, 1951, 65 Stat. 28. The applicable part of § 22 of the 1950 act prior to the 1951 amendment reads as follows:

"That any alien who is a member of any one of the following classes shall be excluded from admission into the United States:

. . . . .

"(2) Aliens who, at any time, shall be or shall have been members of any of the following classes:

. . . . .

"(C) Aliens who are members of or affiliated with (i) the Communist Party of the United States . . .

. . . . .

Petitioner, whom we shall call Mackie, is a native and citizen of Finland. He entered the United States in 1909 at the age of ten months, and has resided in this country continuously since that time. Mackie has lived in Portland, Oregon, for about thirty-three years. He had service in the United States Army for three months in 1941, and for three days in 1942. He was honorably discharged for the "convenience of the government." Mackie married an American citizen on June 24, 1945. There are no children as the issue of this marriage, but his wife has a sixteen-year-old son by a former

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"Sec. 4 (a) Any alien who was at the time of entering the United States, or has been at any time thereafter, . . . a member of any one of the classes of aliens enumerated in section 1(2) of this Act, shall, upon the warrant of the Attorney General, be taken into custody and deported in the manner provided in the Immigation Act of February 5, 1917. The provisions of this section shall be applicable to the classes of aliens mentioned in this Act, irrespective of the time of their entry into the United States."

The 1951 amendment to the above-quoted statute reads as follows:

" . . . That the Attorney General is hereby authorized and directed to provide by regulations that the terms 'members of' and 'affiliated with' were used in the Act of October 16, 1918, as amended, shall include only membership or affiliation which is or was voluntary, and shall not include membership or affiliation which is or was solely (a) when under sixteen years of age, (b) by operation of law, or (c) for purposes of obtaining employment, food rations, or other essentials of living, and where necessary for such purposes."

Such a regulation was promulgated by the Attorney General, effective April 4, 1951. See 16 Fed. Reg. 2907.

The amendatory act of March 28, 1951, setting out the above-quoted qualifications upon the meaning of the terms "members of" and "affiliated with" was repealed by the Immigation and Nationality Act of 1952, 66 Stat. 163, 280, effective December 24, 1952. See Schleich v. Butterfield, 6 Cir., 252 F.2d 191, 193. But the substance of the relevant portion of § 22 as originally enacted was incorporated in the Immigation and Nationality Act of 1952, 66 Stat. 163, 205, 8 U.S.C.A., § 1251(a)(6)(C). See Rowoldt v. Perfetto, supra, page 116.

marriage. Mackie's aged father and mother and two sisters also reside in this country.

On June 17, 1952, a warrant for the arrest and deportation of Mackie was issued by a district director of the Immigration and Naturalization Service. The warrant was served on September 12, 1952. A hearing was held before a special inquiry officer beginning May 11, 1953, and ending May 21, 1953.

On June 30, 1953, the special inquiry officer issued a written decision determining that Mackie was deportable and ordering his deportation. The ground stated for this action was that Mackie had become a member of the Communist Party of the United States after entry into this country. The specific finding was that Mackie had been a member of the Communist party during the years 1937-1939.

Mackie appealed to the Board of Immigration Appeals. The Board found that the record established the ground of deportability by reasonable, substantial and probative evidence. The appeal was accordingly dismissed on September 8, 1953. On November 11, 1954, Mackie moved to reopen the deportation proceedings to enable him to apply for suspension of deportation. This motion was endied on November 29, 1954, but when later renewed was granted on December 23, 1954.

The reopened hearing was held before a special inquiry officer. This officer, on February 16, 1955, entered a written opinion denying the application for suspension of deportation. Suspension was denied for the reason that Mackie had not made a "clean break" with the

Communist party, and there was reason to believe that he was still sympathetic to its principles. The Board of Immigration Appeals affirmed this ruling on May 8, 1955.

While this application for suspension of deportation was pending, Mackie, on December 13, 1954, filed a petition in the United States District Court for a writ of habeas corpus. The grounds on which Mackie relied in this petition were that the evidence did not support the order of deportation, and the statute under which the order was entered was unconstitutional. After the order denying suspension of deportation was entered on February 16, 1955, Mackie amended his petition for a writ of habeas corpus to include as an additional ground that the denial of his motion for suspension of deportation was arbitrary and capricious.

The district court after hearing rendered a decision denying the application for a writ of habeas corpus. Niukkanen v. Boyd, D.C.D.Ore., 148 F.Supp. 106. An order to this effect was entered on March 6, 1956. Mackie appealed to this court and we affirmed. Niukkanen v. Boyd, 241 F.2d 938. Certiorari was denied on December 16, 1957. 355 U.S. 905.

Rowoldt v. Perfetto, supra, was decided by the Supreme Court on December 9, 1957. On December 27, 1957, Mackie filed a motion before the United States Immigration and Naturalization Service for another hearing on his status as a deportable alien. The ground stated for this motion was that the decision in Rowoldt redefined the evidential and substantial requirements

of membership in the Communist party so as to take Mackie out of the class of deportable aliens. This motion was denied by the Board of Immigration Appeals on March 26, 1958.

Relying on the same ground and also renewing the contention that the act is unconstitutional, Mackie filed the instant habeas corpus proceeding on April 4, 1958. The petition was denied by the district court, after hearing, on April 14, 1958, and this appeal followed.

The contention that the act under which the deportation order was entered is unconstitutional as applied to Mackie is identical with a similar contention made on the previous appeal. It was there disposed of adversely to Mackie and will not be re-examined at this time.[2]

We therefore turn to appellant's contention based on the Supreme Court decision in Rowoldt. Mackie argues that it was not proved that he had been a "member" of the Communist party within the meaning of that statutory term, as construed in the Rowoldt decision.

In Galvan v. Press, 347 U.S. 522, the Supreme Court for the first time dealt with the meaning of the term "member" as used in § 22 of the Internal Security Act of 1950. In the course of its opinion the court discussed the kind of a showing which would be insufficient to establish membership and the kind of a showing that would not be required. It further defined the minimum showing that would have to be made by the government.

---

[2] See, also, Ocon v. Guercio, 9 Cir., 237 F.2d 177, 179-180.

It was held, at least inferentially, that membership would not be established by proof that an alien had accidentally, artificially, or unconsciously in appearance only, joined the Communist party with no real knowledge of its platform and purposes. On the other hand, the court ruled, establishment of membership did not require proof that an alien had joined the Communist party with full appreciation of its purposes and program. The minimum proof required to establish membership, the court held, was that an alien had "joined the Party, aware that he was joining an organization known as the Communist Party which operates as a distinct and active political organization, and that he did so of his own free will."

Applying the latter test, the court in Galvan found that under the evidence upon which the hearing officer apparently relied the alien had been a "member" of the Communist party and was therefore deportable. This evidence was to the effect that the alien joined the party on the request of a man he assumed to be an organizer, he attended a number of meetings, he did not apply for citizenship because he feared his party membership would be exposed, and he had been active in, and an officer of, the Spanish Speaking Club, an alleged Communist party unit.

In Rowoldt v. Perfetto, supra, the Supreme Court did not purport to modify the principles to be applied in construing the term "member" as announced in Galvan v. Press. It applied those principles to what the court regarded as the different facts of the Rowoldt

case. It concluded that the minimum requirements of proof referred to in Galvan had not been met.

In this connection the court stated in effect that the evidence in Rowoldt failed to establish "the kind of meaningful association" required by the 1950 act, as amended. The use of the words "meaningful association" is but a shorthand way of referring to the minimum-proof requirement for establishing membership as set out in Galvan.

The precedent value of Rowoldt, then, is not to be derived from an undue emphasis upon the words "meaningful association," as used in that opinion. Rather, it is to be gained by comparing the evidence of membership which was there found to be insufficient with that contained in the record of the case under current consideration.

In Rowoldt v. Perfetto the finding of "membership" rested on Rowoldt's own testimony. According to that testimony, Rowoldt joined the Communist party in the spring or summer of 1935, paid dues, and attended meetings. He remained a member until arrested late in 1935 in connection with deportation proceedings. His reason for joining the party was that he regarded the party and the "fight for bread" as going "hand in hand."

Rowoldt testified that he had no job at the time and that those around him had the idea that they had to fight for something to eat and for clothes and shelter. He and his associates, Rowoldt testified, were not thinking of "overthrowing anything." In stating that they had to "fight" for something to eat, Rowoldt meant that

they had to ask the city, state, and national government for help. The kind of help they wanted was exemplified by the unemployment laws later passed and economic assistance received.

Rowoldt's only active work for the party was that of running its bookstore for a short period. He was a salesman in the store but received no compensation. This store was an official outlet for communist literature. Rowoldt testified that he never advocated change of government by force or violence.

In the instant case, unlike Rowoldt, the government produced indepedent evidence concerning the alien's communist activities, and the latter initially offered no refutation except that of character witnesses. At the original hearing held in May, 1953, Mackie was called to the witness stand by the special inquiry officer and answered general questions concerning his age, residence, place of birth, and the like. The government then called two witnesses.

According to their testimony, Mackie was a dues-paying, card-carrying member of the Communist party from at least 1937 until 1939. In the latter year he was dropped from membership for nonpayment of dues. During the period of his membership Mackie attended from thirty to thirty-five meetings of the "Albina Section" of the Communist party in Portland, Oregon. Once or twice a month Mackie went to the office of the "Labor New Dealer," a weekly trade union newspaper, to obtain copies for distribution. This newspaper was Communist controlled, and was considered to be a Communist party "setup."

Frequently during these visits to the newspaper office Mackie actively participated in discussions which members of the Communist party held in a back room. These discussion pertained ot the policies of the party and the circulation of the newspaper as a party organ. On one occasion Mackie attended a closed party meeting in Aberdeen, Washington, referred to in party circles as a "plenum." This term was used by members of the party in referring to a meeting held for the purpose of reporting the regional activities carried on within the party.

Mackie, according to this testimony, was not an ordinary member of the Communist party, but belonged to what members of the party called the "top fraction," except with regard to its waterfront activity.

At the close of the government's case, several character witnesses were called to testify in Mackie's behalf. As before noted, however, Mackie declined to take the witness stand himself for the purpose of refuting the testimony of the government witnesses concerning his association with the Communist party.[3] At later hearings on his motion to suspend the order of deportation, and in the district court on this habeas corpus application, Mackie did testify—categorically denying that he had ever been a member of the Communist party.

Although appellant attacks the credibility of the government witnesses, the special inquiry officer appar-

[3] The disadvantage to Mackie in his failure to rebut testimony given by the government witnesses was called to his attention by the special inquiry officer, but Mackie persisted in his refusal to give further testimony.

ents found their testimony worthy of belief. The Board of Immigration Appeals and the district court found no warrant for re-evaluating that testimony, and neither do we. Precedent for adopting this course is to be found in Galvan v. Press, where the Supreme Court deemed it appropriate to accept evidence which the hearing officer had found reliable.

In our view the evidence in the instant case more than meets the minimum requirements of proof to establish Communist party membership, as set out in Galvan v. Press, and as referred to in Rowoldt v. Perfetto as "meaningful association." There is no indication here, as in Rowoldt, that the alien joined the party only for "bread and butter" purposes. On the contrary, our appellant, unlike Rowoldt, actively participated in party councils, and was considered to be in a relatively high regional echelon of the party.

Mackie's association with the Communist party, in our opinion, was at least as meaningful as that of Galvan in Galvan v. Press.[4] It was much more meaningful than that of Diaz in Diaz v. Barber, 9 Cir., 261 F.2d 300, whom this court characterized as "a small rabbit in the Communist hutch."

Affirmed.

(Endorsed:) Opinion. Filed Apr. 6, 1959.

Paul P. O'Brien, Clerk.

---

[4] See, also, Williams v. Mulcahey, 6 Cir., 253 F.2d 709; Wellman v. Butterfield, 6 Cir., 253 F.2d 932; and Bong Youn Choy v. Barber, D.C.N.D.Cal., 162 F.Supp. 629, all of which refer to Rowoldt v. Perfetto, but hold the evidence sufficient to sustain a deportation order.

APPENDIX II

(Title of Court and Cause)

JUDGMENT

Appeal from the United States District Court for the District of Oregon.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the District of Oregon, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the Order of the said District Court in this cause be, and hereby is affirmed.

(ENDORSED) Judgment
Filed and entered: April 6, 1959
PAUL P. O'BRIEN, Clerk

COPY

Supreme Court, U.S.
FILED
JUL 22 1959
JAMES R. BROWNING, Clerk

No. 130

In the Supreme Court of the United States

OCTOBER TERM, 1959

WILLIA NIUKKANEN, ALSO KNOWN AS WILLIAM NIUKKANEN, ALSO KNOWN AS WILLIAM ALBERT MACKIE, PETITIONER

v.

EUGENE D. MCALEXANDER, ACTING DISTRICT DIRECTOR, DISTRICT 31, IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
MALCOLM R. WILKEY,
Assistant Attorney General,
ROBERT S. ERDAHL,
JULIA P. COOPER,
Attorneys,
Department of Justice, Washington 25, D.C.

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In the Supreme Court of the United States

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OPINIONS BELOW

The opinion of the court of appeals (Pet. 13–22; R. 93–100)[1] is reported at 265 F. 2d 825. The oral opinion of the district court (R. 77–79, 81–86) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on April 6, 1959 (Pet. 23; R. 101). A petition for

[1] The designation "R." refers to the printed transcript of record. "Tr." refers to the transcript of testimony in the deportation proceeding which has been filed as an exhibit with the printed record.

rehearing was denied on May 19, 1959 (R. 102). The petition for a writ of certiorari was filed on June 20, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence at petitioner's deportation hearing was sufficient to establish that his membership in the Communist Party was a "meaningful association" as required by the decision of this Court in *Rowoldt* v. *Perfetto*, 355 U.S. 115.

2. Whether the statute requiring the deportation of an alien because of membership in the Communist Party after entry, even though prior to the enactment of the statute, is unconstitutional as an *ex post facto* law or a bill of attainder.

STATUTE INVOLVED

The Act of October 16, 1918, 40 Stat. 1012, as amended by Section 22 of the Internal Security Act of 1950, 64 Stat. 987, 1006, provided in pertinent part:

> [Sec. 1] That any alien who is a member of any one of the following classes shall be excluded from admission into the United States:
>
> * * * * * * *
>
> (2) Aliens who, at any time, shall be or shall have been members of any of the following classes:
>
> * * * * * * *
>
> (C) Aliens who are members of or affiliated with (i) the Communist Party of the United States * * *.
>
> * * * * * * *

Sec. 4. (a) Any alien who was at the time of entering the United States, or has been at any time thereafter, * * * a member of any one of the classes of aliens enumerated in section 1(2) of this Act, shall, upon the warrant of the Attorney General, be taken into custody and deported in the manner provided in the Immigration Act of February 5, 1917. The provisions of this section shall be applicable to the classes of aliens mentioned in this Act, irrespective of the time of their entry into the United States.[2]

* * * * *

---

[2] These provisions are now incorporated in Section 241 of the Immigration and Nationality Act of 1952 (8 U.S.C. 1251), which reads in pertinent part:

(a) General classes.

Any alien in the United States * * * shall, upon the order of the Attorney General, be deported who—

* * * * *

(6) is or at any time has been, after entry, a member of any of the following classes of aliens:

* * * * *

(C) Aliens who are members of or affiliated with (i) the Communist Party of the United States; * * *.

* * * * *

(d) Applicability to all aliens.

Except as otherwise specifically provided in this section, the provisions of this section shall be applicable to all aliens belonging to any of the classes enumerated in subsection (a) of this section, notwithstanding (1) that any such alien entered the United States prior to June 27, 1952, or (2) that the facts, by reason of which any such alien belongs to any of the classes enumerated in subsection (a) of this section, occurred prior to June 27, 1952.

* * * * *

STATEMENT

Petitioner, a native and citizen of Finland, seeks review of the judgment of the court of appeals affirming a judgment of the District Court for the District of Oregon. The district court had denied petitioner relief from an order directing his deportation on the ground that he is an alien who, after entry into the United States, had become a member of the Communist Party within the meaning of the Act of October 16, 1918, as amended by Section 22 of the Internal Security Act of 1950, 64 Stat. 987, 1006 (*supra*, pp. 2–3).

1. On June 17, 1952, the District Director of the Immigration and Naturalization Service issued a warrant of arrest which recited that petitioner, who had entered this country on September 5, 1909, had been, after entry, a member of the Communist Party and was therefore subject to deportation (R. 5).[3] The warrant was served on September 12, 1952 (R. 5), and hearings were held before a Special Inquiry Officer on May 11 and May 21, 1953 (R. 19). On June 30, 1953, the Special Inquiry Officer specifically found that petitioner had been a member of the Communist Party during the years 1937 to 1939 and ordered his deportation (R. 17–18, 22–23, 47, 83, 95).

On petitioner's appeal from this order, the Board of Immigration Appeals found that the record estab-

[3] Since the Immigration and Nationality Act of 1952 was not enacted until later in June, 1952, the warrant of arrest (and hence the proceedings as a whole) were instituted under the Act of October 16, 1918, as amended by Section 22 of the Internal Security Act of 1950.

lished the ground of deportability by reasonable, substantial, and probative evidence and accordingly dismissed the appeal on September 8, 1953 (R. 17–18, 83, 95).

On November 11, 1954, petitioner moved to reopen the proceeding in order that he might apply for suspension of deportation. This motion was denied on November 29, 1954, but, after being renewed, was granted on December 23, 1954 (R. 17–18, 84). On February 16, 1955, after a hearing, a Special Inquiry Officer denied petitioner's application for suspension of deportation, finding that he had not made a "clean break" with the Communist Party and that there was reason to believe that he was still sympathetic with its principles. The Board of Immigration Appeals affirmed this order on May 13, 1955 (R. 17–23, 84).

While his application for suspension of deportation was pending, petitioner, on December 13, 1954, petitioned the district court for a writ of habeas corpus alleging that the evidence against him did not support the order of deportation and that the statute under which the order was issued was unconstitutional. After the order denying suspension of deportation was entered by the Special Inquiry Officer on February 16, 1955, the petition for a writ of habeas corpus was amended to include the additional argument that the denial of suspension was arbitrary and capricious (R. 84, 95–96).

The district court, after a hearing, denied the petition on March 2, 1956 (R. 84). *Niukkanen* v. *Boyd*, 148 F. Supp. 106 (D. Ore.). On February 8, 1957, the court of appeals affirmed. *Niukkanen* v. *Boyd*,

241 F. 2d 938 (C.A. 9). A petition for a writ of certiorari was denied on December 16, 1957. 355 U.S. 905.

On December 27, 1957, on the basis of this Court's decision of December 9, 1957, in *Rowoldt* v. *Perfetto*, 355 U.S. 115, petitioner sought administrative reconsideration of his status as a deportable alien. He claimed that the *Rowoldt* decision "so redefined the substantial and evidential requirements of membership in the Communist Party of the United States as to take petitioner out of the class of deportable aliens." This motion was denied by the Board of Immigration Appeals on March 26, 1958 (R. 9; see also R. 85). Relying on this same ground, and renewing his contention that the statute is unconstitutional, petitioner instituted the instant proceeding in the district court on April 4, 1958 (R. 3–16). After a hearing (R. 46–77), the district court denied the petition on April 14, 1958 (R. 77–79, 81–86).

2. At the original administrative hearing held in May 1953, petitioner was called to the stand and answered general questions relative to his age, parentage, residence, etc. The government then called two witnesses, Wilmot and Knipe, who had themselves been active card-carrying members of a Portland, Oregon, section of the Communist Party during the years 1937 to 1939. Both of these witnesses testified that petitioner was a card-carrying member of the Party during this period. Both said they saw petitioner pay his dues at a Party office and receive stamps to be affixed in his membership book, which they also saw (Tr. 14–15, 46, 69).

Wilmot, who was at the time the editor of the Labor New Dealer in Oregon, which was "Communist set-up and controlled," testified that petitioner came to his office once or twice a month to obtain copies of the paper for distribution (Tr. 15, 17, 19–20). In a back room of the office, closed to non-Party members, petitioner would, during these visits, gather with Party members and actively participate in discussions pertaining to Party policies and the circulation of the paper as a Party organ (Tr. 20–22). Wilmot saw petitioner at many closed Party meetings in Portland (Tr. 15, 17) and at an out-of-state "plenum," a meeting held for the purpose of reporting regional activities of the Party. Admission was by card only and petitioner was known at the meeting (Tr. 26). In Wilmot's opinion, petitioner belonged to the "top-fraction" in this area and "knew where he was going" (Tr. 27, 32).

Knipe testified that he saw petitioner at from thirty to thirty-five closed meetings (Tr. 67) and that petitioner took an active part in discussions (Tr. 67). He said that petitioner served on the executive board of the area branch (Tr. 68).

At the conclusion of this testimony, petitioner declined to take the stand, although the disadvantage of his remaining silent was called to his attention by the Special Inquiry Officer (R. 67). At later hearings on the motion for suspension of deportation and in the district court, petitioner denied that he had ever knowingly been a member of the Communist Party (R. 19–21, 54).

ARGUMENT

In its oral opinion rejecting this second attack on the order for petitioner's deportation, the district court reviewed the prior proceedings in this matter, including this Court's denial of petitioner's earlier petition for a writ of certiorari only a week after its decision in *Rowoldt* v. *Perfetto,* 355 U.S. 115, and aptly observed that "Almost six [now seven] years have elapsed since the warrant was served upon the Petitioner, and the delay * * * has been occasioned solely by Petitioner's resort to administrative and court proceedings to assert contentions which have been found to be without merit" (R. 85). See also the opinion of the court of appeals (Pet. 14–17; 265 F. 2d at 826–827). We submit that the contentions in this proceeding, which had previously been decided against petitioner, are no more meritorious now than when they were first before this Court in *Niukkanen* v. *Boyd,* No. 992, O.T. 1956, renumbered No. 121, O.T. 1957.

1. The original argument of the *Rowoldt* case in this Court was heard in November 1956. The petition in No. 992, O.T. 1956, urging that the proof showed that petitioner was merely a nominal member of the Communist Party within the exception noted by this Court in its earlier decision in *Galvan* v. *Press,* 347 U.S. 522, 529, was filed on May 13, 1957. In its brief in opposition, the government argued that the evidence established that petitioner was "a card-carrying, dues-paying member of the Party, one of the 'top fraction' of his branch" (p. 6), but suggested that the Court might wish to defer action on the petition until it had decided *Rowoldt.* *Rowoldt* was reargued in

October 1957, and decided on December 9, 1957. 355 U.S. 115. Niukkanen's petition was denied on December 16, 1957. 355 U.S. 905.

No new evidence on the question of deportability under the principles of *Galvan* and *Rowoldt* has been adduced. There is thus no occasion for further review of the administrative record which was previously before this Court and which has now twice been reviewed by the Board of Immigration Appeals and the courts below on the issue of its sufficiency to support the deportation order. In any event, the evidence of petitioner's active Party activities introduced at the deportation hearing (*supra*, pp. 6–7) clearly satisfies the standard of "meaningful association" prescribed by *Rowoldt*. See the careful comparison by the court of appeals of the evidence in *Rowoldt* and in the instant case (Pet. 19–22; 265 F. 2d at 828–829).

2. While conceding (Pet. 5) that this Court has, in the *Galvan* case, *supra*, and in *Harisiades* v. *Shaughnessy*, 342 U.S. 580, sustained the statute in question against the argument that it is an *ex post facto* law, petitioner claims that the Court has not passed on his contention that it is invalid as a bill of attainder (Pet. 5–9). Both of these contentions were also urged without success in his prior petition.

In the *Galvan* case the statute was attacked on both grounds. The contention that the statute is a bill of attainder, as well as an *ex post facto* law, was briefed at length (see No. 407, Oct. Term, 1953, Brief for Petitioner, pp. 53–57; Brief for Respondent, pp. 63–66), and the petitioner there relied on the same inapposite

cases which petitioner invokes here.[4] While the Court did not expressly mention the bill of attainder clause in its decision, the holding in *Galvan,* like that previously in *Harisiades*—that a statute providing for deportation for past membership in the Communist Party (even though the alien might have been unaware of the party's advocacy of violence) does not offend the *ex post facto* clause, or due process generally—is dispositive as well of the contention that it is a bill of attainder. Only punitive legislation falls within the constitutional prohibitions against both *ex post facto* laws (*Galvan, supra,* 347 U.S. at 531; *Harisiades, supra,* 342 U.S. at 594) and bills of attainder (*United States* v. *Lovett,* 328 U.S. 303, 315, 321–324). Since "the unbroken rule of this Court that [the *ex post facto* clause] has no application to deportation" is based on the conclusion that deportation is not punishment (*Galvan, supra,* 347 U.S. at 531[5]), it follows that the bill of attainder clause equally inapplicable.

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[4] *United States* v. *Lovett,* 328 U.S. 303; *Ex parte Garland,* 4 Wall. 333; *Pierce* v. *Carskadon,* 16 Wall. 234; *Cummings* v. *Missouri,* 4 Wall. 277.

[5] In the *Harisiades* case (342 U.S. at 595) this Court referred to the *Garland, Cummings,* and *Pierce* cases, *supra,* in regard to the contention that in those cases the *ex post facto* clause had been applied to what appeared to be civil disabilities: "The Court has since explained that those cases proceeded from the view that novel disabilities there imposed upon citizens were really criminal penalties for which civil form was a disguise. *Burgess* v. *Salmon,* 97 U.S. 381, 385. Those cases were known to the Justices who promulgated the above-quoted opinions [in the deportation cases of *Bugajewitz* v. *Adams,* 228 U.S. 585, and *Mahler* v. *Eby,* 264 U.S. 32] but have never been considered to govern deportation." See also *Lehman* v. *Carson,* 353 U.S. 685; *Mulcahey* v. *Catalanotte,* 353 U.S. 692; *Mahler* v. *Eby,* 264 U.S. 32, 39; *Bugajewitz* v. *Adams,* 228 U.S. at 591.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.
MALCOLM R. WILKEY,
Assistant Attorney General.
ROBERT S. ERDAHL,
JULIA P. COOPER,
Attorneys.

JULY 1959.

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Petitioner,

v.

EUGENE D. McALEXANDER, Acting District Director, District 31, Immigration and Naturalization Service,

Respondent.

PETITIONER'S BRIEF ON THE MERITS

REUBEN LENSKE,
Lawyers Building,
Portland, Oregon,
Attorney for Petitioner.

Of Counsel:

NELS PETERSON,
901 Loyalty Building,
Portland 4, Oregon,

GERALD H. ROBINSON,
1006 Failing Building,
Portland 4, Oregon.

STEVENS-NESS LAW PUB. CO. PORTLAND, ORE. 11-59

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EUGENE D. McALEXANDER, Acting District Director, District 31, Immigration and Naturalization Service,

Respondent.

PETITIONER'S BRIEF ON THE MERITS

CITATIONS TO OPINIONS BELOW

The oral opinion of the United States District Court for the District of Oregon was rendered on the 14th day of April, 1958, and appears at page 81 of the record. The opinion of the United States Court of Appeals for the Ninth Circuit is dated April 6, 1959, and is reported at 265 F2d 825.

JURISDICTION

The jurisdiction of this Court in invoked under 28 U.S.C. 1254 (1). The judgment of the Court of Appeals was entered on April 6, 1959 (R. 101) and a timely petition for rehearing was denied on May 19, 1959 (R. 102). The petition for certiorari was filed on June 20, 1959 and granted by this Court on October 12, 1959.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves the application of the following provision of the United States Constitution:

> Article I, Section 9, Clause 3: "No Bill of Attainder or ex post facto Law shall be passed."

The constitutionality of the following statute is involved:

> 8 U.S.C. 1251 (a) (6) (C): "Any alien in the United States . . . shall, upon the order of the Attorney General, be deported who . . . is or at any time has been, after entry, a member of any of the following classes of aliens:
>
> ". . . aliens who are members of or affiliated with (i) the Communist Party of the United States."

Application of the following statute is involved:

> 8 U.S.C. 1252 (b) (4): ". . . no decision of deportability shall be valid unless it is based upon reasonable, substantial and probative evidence."

QUESTIONS PRESENTED

Petitioner was born in Finland in 1908 and entered this country less than a year later. He has been ordered

deported on the ground that he allegedly was a member of the Communist Party of the United States during the years 1937-39, and his application for suspension of deportation was denied by the Board of Immigration Appeals. On a previous proceeding testing the validity of the Government's refusal to suspend deportation, whether or not there was reasonable, substantial and probative evidence that Petitioner was a member of the Communist Party within the meaning of *Galvan v. Press,* 347 U.S. 522, and whether or not the Act under which the Government seeks to deport Petitioner (8 U.S.C. 1251 (a) (6) (C)) is a violation of the Constitution of the United States, the deportation order was sustained. 148 F.S. 106, 241 F. (2d) 938, certiorari denied December 16, 1957, 355 U.S. 905.

The questions presented in this Petition are:

1. Whether 8 U.S.C. 1251 (a) (6) (C) violates the Constitution of the United States by reason of

(a) being a Bill of Attainder;

(b) being an Ex Post Facto Law;

(c) violating Due Process of Law; and

(d) infringing on freedom of speech.

2. Whether the Petitioner's alleged association with the Communist Party, on the record of this case, was "meaningful" and "political" within the rule of *Rowoldt v. Perfetto,* 355 U.S. 115.

STATEMENT OF THE CASE

Petitioner* and his parents have resided in the United States since 1909 and in Portland, Oregon for about 33 years where Petitioner is a house painter.

Petitioner is the only surviving son of his parents, a brother having been killed during World War II on a ship near Wake Island (Tr. 172). He was drafted in 1944 and served 95 days in the Army, and received an Honorable Discharge for medical reasons (Tr. 8, 9).

On June 17, 1952, a warrant for the arrest and deportation of Petitioner was issued by the Immigration Service and was served upon him on or about September 12, 1952. In the warrant, it was alleged that Petitioner was a member of the Communist Party after entry into the United States from 1937 to 1939.

The Government's case was based upon testimony of two witnesses, Walter R. P. Wilmot and Lee Arthur Knipe. The Board of Immigration Appeals discounted the testimony of Knipe because he had lied during this and other hearings by denying a prior criminal conviction in California. Wilmot admitted that at the time Petitioner was alleged to be a Communist, he himself was a very heavy drinker (Tr. 49, 50).

Petitioner did not testify at the deportation hearing but on the hearing of his application for suspension of deportation, he denied that he was a Communist Party member at any time (Tr. 203, 204).

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* The Transcript of the hearings before the Immigration Service will be referred to as "(Tr. —)", and the record made in the District Court will be referred to as "R. —)".

Wilmot and Knipe both testified that they were active card-carrying members of the Communist Party during 1937 to 1939 and that Petitioner was also a card-carrying member during this period. They both asserted that they saw Petitioner pay his dues at the Party office and receive stamps to be put in his membership book, which they also claimed to have seen (Tr. 14-15, 46, 69). Wilmot, the then editor of the "Labor New Dealer", a CIO newspaper, testified that Petitioner assisted in the distribution of this newspaper once or twice a month (Tr. 15, 17, 19-20). Wilmot also swore that Petitioner participated in closed discussion of Communist Party policies and the circulation of the Labor New Dealer in the back room of Wilmot's office (Tr. 20-22). Both Knipe and Wilmot stated that they saw Petitioner at many closed Party meetings in Portland (Tr. 15, 17, 67) and Wilmot said that Petitioner attended an out of state "plenum" (Tr. 26). Wilmot asserted that Petitioner belonged to the "top fraction" of the Communist Party and "knew where he was going" (Tr. 27-32). Knipe testified that Petitioner served on the Executive Board of the Area Branch (Tr. 68).

Petitioner was and apparently still is ignorant of Communist history and theory, even according to the Government witnesses (Tr. 70-75, 201, 202; R. 61, 62).

SUMMARY OF ARGUMENT

The portion of the McCarran-Walter Immigration Act under which the Government seeks to deport Petitioner is unconstitutional as a Bill of Attainder because

the Constitutional prohibition against Bills of Attainder is an absolute restriction on the power of Congress, without any exception in deportation cases. The Act in question is a Bill of Attainder because it imposes a penalty on easily ascertainable members of a group without judicial trial.

Deportation is a penalty or punishment within the bar against Bills of Attainder, and Petitioner is protected even though he is an alien.

Since the Act operates as a penalty for past conduct, it is a Bill of Attainder within the definition of *American Communications Association, CIO v. Douds,* 339 U.S. 382 (1950).

The Court can hold the Act unconstitutional without overruling its precedent in *Galvan v. Press,* 347 U.S. 522, and *Harisiades v. Shaughnessy,* 342 U.S. 580.

Furthermore, Petitioner is not deportable because the evidence fails to disclose that he had a meaningful political association with the Communist Party as required in *Rowoldt v. Perfetto,* 355 U.S. 115, because it only tends to prove that Petitioner paid dues and attended various meetings of the Communist Party. The witnesses against the Petitioner are also not worthy of belief and because of this fact, the evidence against Petitioner is not "substantial and probative" as required by 8 U.S.C. 1252 (b) (4).

ARGUMENT

1. The Statute Under Which Petitioner Was Ordered Deported Is Unconstitutional.

In *Galvan v. Press,* 347 U.S. 522, and *Harisiades v. Shaughnessy,* 342 U.S. 580, all Constitutional issues were decided against the aliens involved, except the question of whether the Act is a Bill of Attainder. Because of this fact, this brief will be confined to the Bill of Attainder issue and whether Petitioner is deportable under *Rowoldt v. Perfetto,* 355 U.S. 115.

Article I, Section 9, Clause 3 enjoins Congress from passing a Bill of Attainder. It is unqualified and without exception.

Bills of Attainder were well known and recognized in England for many centuries prior to the colonization of America and the reception of the common law in what is now the United States. They were enacted by Parliament from time to time to deal with serious political questions, and often to eliminate political offenders.

> "One abuse of fair procedure which died out only very slowly in England and America was a simple legislative enactment declaring a man guilty of some heinous offense—usually treason—and arbitrarily imposing some punishment upon him, commonly death and the forfeiture of all property, without the formality of a trial. Bills of Attainder were still fairly common during the political disturbances of the 17th century. Thus in 1641, the Parliament arbitrarily adjudged the Earl of Strafford to be attainted of high treason and condemned him to suffer death and forfeiture of his entire estate. Again, after the Restoration in 1660, the Par-

liament dominated by Charles II and his henchmen voted Bills of Attainder against certain of the followers of Oliver Cromwell." (Alfred H. Kelly, *Where Constitutional Liberty Came From,* 1954, Carey Chapman Catt Memorial Fund, Inc., p. 20-21).

As Cooley has pointed out, in addition to Bills of Attainder there were also enactments called "Bills of Pains and Penalties," which differed from the Bills of Attainder only in that the punishments imposed were less than death. (The General Principles of Constitutional Law, 1931, 4th Ed., p. 355.)

Bills of Attainder were used in several American colonies during and after the Revolutionary War as measures against those who remained loyal to Great Britain. For instance, the Act of the New York Legislature of October 1779 declared the Earl of Dunmore, the former Governor of New York, and some forty-seven other people to be guilty of treason, declared all of their property confiscated to the State of New York, and banned them under penalty of death should they ever return. (See: Alfred H. Kelly, Where Constitutional Liberty Came From, 1954, pp. 20-21.)

Indeed, this Court held in *Cooper v. Telfair,* 4 Dall. 14, that a state legislature had the power to pass a Bill of Attainder before the adoption of the United States Constitution, unless it was restrained by the state constitution.

In that case, it was said that a Bill of Attainder is a political act and the power to pass it is inherent in the sovereignty of a state.

The aforementioned New York Bill of Attainder of October 22, 1779, was involved in the case of *Sleight v. Kane,* 2 Johnsons Cases 236 (Supreme Court, New York), in which it was held that a British subject whose estate was forfeited to the State of New York pursuant to the Bill of Attainder could not maintain a counter-claim for rent in an action on a promissory note.

For similar enactments see 2 Belknap, History of New Hampshire (1912), and 2 Story, Commentaries on the Constitution (1891, 5th Ed.), page 217, note 5a.

The last cited authority states the general attitude of the colonists towards Bills of Attainder once the pressures of the Revolutionary War had passed away.

> "The injustice and inequities of such acts, in general, constitute an irrestible argument against the existence of the power. In a free government it would be intolerable; and in the hands of a reigning faction, it might be, and probably would be, abused to the ruin and death of the most virtuous citizens." (p. 217)

Not only did the Constitutional Convention bar Congress from passing Bills of Attainder, it placed a similar impediment on state action. Article I, Section 10. No less an authority than James Madison, the "Publius" of the Federalist papers, described Bills of Attainder as being "contrary to the first principles of the social contract, and to every principle of sound legislation." (The Federalist No. 44, Modern Library Edition, page 291.)

The weight of authority, both judicial and scholarly, supports the proposition that Congress has no power to pass a Bill of Attainder of any kind or nature, or for

any purpose whatsoever. This Court has implied in *Cooper v. Telfair,* 4 Dall. 14, that even in the exercise of sovereign authority, a Bill of Attainder passed after the enactment of the United States Constitution would be invalid.

In considering whether the Act in question is a Bill of Attainder we refer to this Court's definition in *U. S. v. Lovett,* 328 U.S. 303:

> "They [the Cummings and Garland cases] stand for the proposition that the legislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without judicial trial are Bills of Attainder prohibited by the Constitution." (328 U.S. at 305)

Section 1251 (a) (6) (C) possesses all of the attributes of a Bill of Attainder described in *Lovett, Cummings* and *Garland.* It imposes a penalty of deportation upon members of a named and ascertainable group, namely alien members of the Communist Party, and it does so without judicial trial.

That the individual aliens, the objects of Congressional action, were not specifically named makes no difference whatsoever. In both *Ex Parte Garland,* 4 Wall. 333, and in *Cummings v. Missouri,* 4 Wall. 277, the invalid acts were directed at unnamed members of groups, specifically those who had participated in the Civil War on the side of the Confederacy. In both cases the Court struck down restrictions on preaching and the practice of law by those who could not take the required oath of non-involvement on behalf of the Con-

federacy. It should be carefully noted that in neither *Garland, Cummings* nor *Lovett* were the penalties imposed "criminal punishments."

In the case of *Lovett,* he and other named persons were deprived of their salaries, while in *Cummings* and Garland, the aggrieved parties were denied the right to practice their professions.

We are surprised to learn of the confusion in the minds of Government counsel as manifested in their Brief in Opposition to the Petition for Certiorari in this case, as to the distinction between Ex Post Facto Laws and Bills of Attainder. In arguing that this Court's decisions in *Galvan v. Press,* 347 U.S. 522, and *Harisiades v. Shaughnessy,* 324 U.S. 580, are dispositive of the Bill of Attainder issue, even though not mentioned in the opinions, the Government apparently assumes that because the Ex Post Facto clause has no application to deportation, neither does the Bill of Attainder clause.

Nothing could be further from the truth. The two clauses refer to distinct kinds of legislation and were placed in the Constitution to remedy two different evils. There has never been a requirement that an Act impose "criminal punishment" for it to qualify as a Bill of Attainder. This is shown conclusively by *Lovett, Garland* and *Cummings.* It is clear that any deprivation of any right, privilege, or salary, by legislative enactment in the nature of a Bill of Attainder is the evil at which the Constitutional prohibition is aimed.

Certainly if the deprivation of a salary in *Lovett,*

or the right to practice law or preaching in *Garland* and *Cummings*, are penalties, deportation is in this category.

There is considerable authority to the effect that deportation does inflict literal punishment and constitutes in law a deprivation of rights and privileges.

> "Though deportation is not technically a criminal proceeding, it visits a great hardship on the individual and deprives him of the right to stay and live and work in the land of freedom. That deportation is a penalty—at times a most serious one—cannot be doubted." *Bridges v. Wixon,* 326 U.S. 135, 154.

Judge Learned Hand in *United States Ex Rel Klonis v. Davis*, 13 F.2d 630, in speaking of an alien long resident here who was about to be deported following conviction for a crime, characterized deportation as "dreadful punishment." Deportation in general, and in the case at bar in particular, separates the alien from his American family and from his friends. It removes him from his home and returns him to a strange land where he is without friends, without family and without employment. In short, it deprives him of what Justice Brandeis once called "all that makes life worth living." *Ng Fung Ho v. White,* 259 U.S. 276, 284.

Finally, this Court has stated the policy of the Constitution in clear and unequivocal terms through Mr. Justice Field in *Cummings v. Missouri,* supra, at pages 321-322:

> "The theory upon which our political institutions rest is that all men have certain inalienable rights—that among these are life, liberty and the pursuit of happiness; and that in the pursuit of happiness all

> avocations, all honors, all positions are alike open to everyone, and that in the protection of these rights all are equal before the law. Any deprivation or suspension of any of these rights for past conduct is punishment, and can be in no otherwise defined."

American Communications Association, CIO v. Douds, 339 U.S. 382 (1950), carefully distinguished between Bills of Attainder such as passed in *Lovett, Garland* and *Cummings* from the Section 9(h) of the Taft-Hartley Act which barred the NLRB from acting on complaint of unions who had not filed officers' non-Communist affidavits.

The Court said that the Taft-Hartley Act was not a Bill of Attainder because it was a legitimate classification and regulation of union officers who might be sympathetic to the Communist cause. The Court said, referring to *Lovett, Garland* and *Cummings*:

> "Those cases and this also, according to the argument, involve the proscription of certain occupations to a group classified according to belief and loyalty. But there is a decisive distinction: In the previous decisions individuals involved were in fact being punished for *past* actions; whereas in this case they are subject to possible loss of position only because there is substantial ground for the Congressional judgment that their beliefs and loyalties will be transformed into *future* conduct. Of course, the history of the past conduct is the foundation for the judgment as to what the future conduct is likely to be; but that does not alter the conclusion that Section 9(h) is intended to prevent future action rather than to punish past action." 339 U.S. at 413-414.

It is evident from *Douds* that had the Taft-Hartley

Act operated retrospectively rather than prospectively, it would have fallen within the bar against Bills of Attainder.

That the Act in question here operates as a punishment for past action is too clear for anyone to dispute. Indeed there is no evidence in the record that this Petitioner poses any threat to the United States by his continued residence here. As a matter of fact, he has lived a creditable life, contributing his best in war and peace. The entire basis for deportation here is an alleged association twenty years ago. Such association demonstrates no relationship to future conduct on the part of Petitioner, nor to his entry into the United States. It must be recalled that Petitioner was a child of less than one year of age when he came to this country. His conduct in 1937 and 1939 could hardly have been related to his entry, and twenty years later it can hardly be said to form the basis of a judgment as to any peril to the United States which would arise from his continued presence within this country.

If the classification of persons in *Douds* was a reasonable exercise of Congressional judgment, the same cannot be said for the Act in question. It has been said that the power to deport is implied from the sovereign power of the United States to control the entry of aliens into its territory. If so, the basis of deportation here is so remote from the entry of this Petitioner into this country that there is no causal connection whatsoever.

If it is to be argued that the standards of the Constitu-

tion with respect to Bill of Attainder cast no protection over aliens who reside here, we can only refer the Court to its decisions in such cases as *Lem Moon Sing v. United States*, 158 U.S. 538; *Wong Wing v. United States*, 163 U.S. 228; *Yick Wo v. Hopkins*, 118 U.S. 356. The Court has repeatedly declared that an alien lawfully here is entitled to the same Constitutional safeguards to protect his life, liberty and property as a citizen.

> "His personal rights when he is in this country . . . are as fully protected by the supreme law of the land as if he were a native or naturalized citizen of the United States." *Lem Moon Sing v. United States*, 158 U.S. 538, 547.

As we have pointed out, Bills of Attainder against aliens were well known before the Constitution, and the prohibition against them contained in the supreme law of the land is by its terms absolute and unqualified. This Court in *Cooper v. Telfair*, 4 Dall. 14, implied that had the Bill of Attainder passed by the Georgia Legislature been enacted after the approval of the United States Constitution, it would have been invalid. This, regardless of the fact that the law was passed pursuant to the inherent or sovereign power of the state legislature.

The Constitution did not except aliens from the protection of the ban on Bills of Attainder; indeed, its range is as broad as the territory of the United States. It is significant that the prohibition against Bills of Attainder is included in Article I among the many other restrictions on the powers of Congress. Congress can

legislate only where power is delegated to it. Where it is expressly denied, it may not act at all.

We suggest that there has been no showing whatever of extraordinary circumstances which justify suspension of a basic Constitutional safeguard such as the Bill of Attainder clause. There is no war emergency; there is no threat of revolution. There is no evidence in this case that this Petitioner ever committed a single overt act against the best interests of the United States of America. On the contrary, his loyalty and devotion is unquestioned. Yet the blind, narrow, fanaticism which underlies the McCarran-Walter Immigration Law has been put into motion by Governmental authorities who have been willing to spend literally thousands of dollars over several years in an attempt to deport this harmless person to a far-off country which he does not even remember. One is compelled to wonder what dangers will be avoided, or what bureaucratic satisfactions will be gratified should Petitioner be finally deported.

As we suggested in the Petition for Certiorari, the time has come to cast the protection of this Court about not only this Petitioner but around all aliens who have been the object of politically inspired hysteria and abuse.

Banishment is a brutal thing; this Court is the great bulwark against such excesses. The liberties of all Americans, citizens and aliens alike, lie in the palm of this Court's steady hand. Not only humanity but the basic foundation of a free way of life as outlined in

the Constitution cry out for the Court to condemn an Act which has repelled most Americans and has caused this country to be ridiculed and scorned abroad.

In order to strike down the Act, this Court need not overrule *Galvan* and *Harisiades*. It need only follow the logic of precedent and the plain meaning of the Constitution and hold that the Act is a Bill of Attainder.

2. The Evidence Shows That The Alleged Membership Of The Petitioner In The Communist Party Was Not A Meaningful Political Association Under The Rule Of Rowoldt v. Perfetto.

We know this Court will carefully examine the record to determine if the facts in this case meet the statutory requirement of "substantial and probative" evidence that the alien has had a meaningful association "not wholly devoid of political implications."

The nub of Petitioner's case is that in *Rowoldt,* an alien was not held to have had a meaningful political association with the Communist Party after admitting that he had attended Communist Party meetings, paid membership dues, and worked in a Communist Party bookstore in which Marxist and Communist literature was sold. Rowoldt demonstrated a high degree of sophistication concerning Communism and the history of the Russian Revolution. (355 U.S. 116-118, 120, 129-130)

He testified that he joined the Communist Party for economic reasons during the depression (355 U.S. 117-118).

In the case at bar, Petitioner vigorously denied mem-

bership in the Communist Party (Tr. 198, 203, 204, 220; R. 54), and the most evidence against him that could be gleaned from two highly untrustworthy witnesses was that he was alleged to have attended Communist Party meetings, paid dues, helped circulate a labor newspaper, and attended perhaps one out of state meeting.

The Court of Appeals in its decision places considerable stress upon the alleged leadership role of the Petitioner, and the testimony that he belonged to "the top fraction" of the Party. But a close reading of this testimony indicates that this term was not explained. For all anyone knows, it is without substance. It should be emphasized that while one witness, Wilmot, testified that Petitioner was a "functionary" (Tr. 15) the other witness, Knipe, denied it (Tr. 68).

We know that both of these witnesses were untrustworthy and wholly unsatisfactory but how strange it is for the Government to insist that its case has been proved when they contradict one another in such an important matter.

Unfortunately many reviewing courts, including the Court of Appeals in this instance, have failed to apply the clear requirements of 8 U.S.C. 1252 (b) (4) that evidence to support deportation must be "substantial and probative", to the facts of each case. Instead they merely ask if there is any evidence to support the administrative findings and if so their review is closed without any appellate evaluation of the truthfulness or reliability of witnesses.

We suggest that Courts of Appeal should exercise more independent judgment in these cases. Great issues are at stake for the individuals involved and for the freedom of this country in general. The courts should recognize that these hearings are held in the Immigration Department where the hearing officers are part and parcel of the machinery of deportation. They must realize that there is little or no independent judgment on these cases at the administrative level. It is up to the Courts to see that the standards of the Act, such as they are, are carefully applied and where a court will not re-examine the credibility of witnesses or the sufficiency of the evidence, then basic rights have been denied to this Petitioner and many other aliens.

It is perfectly clear that here Petitioner was and apparently still is grossly ignorant of Communist history and theory (Tr. 70, 75, 201, 202; R. 61-62). There is no evidence whatsoever in the record that if Petitioner was a member of the Communist Party he was aware and interested in its political as distinct from its economic and welfare activities. If Rowoldt, a relatively sophisticated and informed person who had worked in a Communist Party bookstore, should be protected from deportation then surely Petitioner is entitled to the same relief.

CONCLUSION

Petitioner respectfully requests that this Court reverse the judgment and remand the case for dismissal of the deportation proceedings lodged against

him. If the Court does not choose to rule on the Constitutional issue of "Bill of Attainder" it can dispose of this case in the interests of justice by finding that the evidence of the two unreliable Government witnesses is wholly inadequate to meet the standards of the Act which require "substantial and probative evidence" to support an order of deportation.

Respectfully submitted,

REUBEN LENSKE,
Lawyers Building,
Portland, Oregon,
Attorney for Petitioner.

Of Counsel:

NELS PETERSON,
901 Loyalty Building,
Portland 4, Oregon,

GERALD H. ROBINSON,
1006 Failing Building,
Portland 4, Oregon.

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No. 130

In the Supreme Court of the United States

OCTOBER TERM, 1959

WILLIA NIUKKANEN, ALSO KNOWN AS WILLIAM NIUKKANEN, ALSO KNOWN AS WILLIAM ALBERT MACKIE, PETITIONER

v.

EUGENE D. MCALEXANDER, ACTING DISTRICT DIRECTOR, DISTRICT 31, IMMIGRATION AND NATURALIZATION SERVICE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT

J. LEE RANKIN,
Solicitor General,
MALCOLM R. WILKEY,
Assistant Attorney General,
BEATRICE ROSENBERG,
JULIA COOPER,
Attorneys,
Department of Justice,
Washington 25, D. C.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINION BELOW

The opinion of the Court of Appeals (R. 91) is reported at 265 F. 2d 825.

JURISDICTION

The judgment of the Court of Appeals was entered on April 6, 1959 (R. 99). A petition for rehearing was denied on May 19, 1959 (R. 99). The petition for a writ of certiorari was filed on June 20, 1959, and was granted on October 12, 1959 (R. 100). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence at petitioner's deportation hearing was sufficient to show that he was an alien subject to deportation because, after entry into the United States, he had become a member of the Communist Party within the meaning of the Internal Security Act of 1950.

2. Whether the statute requiring the deportation of an alien because of membership in the Communist Party after entry is unconstitutional as a bill of attainder.

STATUTES INVOLVED

The Act of October 16, 1918, 40 Stat. 1012, as amended by Section 22 of the Internal Security Act of 1950, 64 Stat. 987, 1006, provided in pertinent part:

> [Sec. 1] That any alien who is a member of any one of the following classes shall be excluded from admission into the United States:
>
> * * * * *
>
> (2) Aliens who, at any time, shall be or shall have been members of any of the following classes:
>
> * * * * *
>
> (C) Aliens who are members of or affiliated with (i) the Communist Party of the United States* * *.
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> * * * * *
>
> Sec. 4. (a) Any alien who was at the time of entering the United States, or has been at any time thereafter, * * * a member of any one of the classes of aliens enumerated in section 1(2) of this Act, shall, upon the warrant of the Attorney Gen-

eral, be taken into custody and deported in the manner provided in the Immigration Act of February 5, 1917. The provisions of this section shall be applicable to the classes of aliens mentioned in this Act, irrespective of the time of their entry into the United States.[1]

* * * * *

STATEMENT

Petitioner, a native and citizen of Finland, seeks review of the judgment of the Court of Appeals affirming a judgment of the District Court for the District of Oregon which denied him relief from an order directing his deportation on the ground that he is an alien who, after entry into the United States, had become a mem-

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[1] These provisions are now incorporated in Section 241 of the Immigration and Nationality Act of 1952 (8 U.S.C. 1251), which reads in pertinent part:

(a) General classes.

Any alien in the United States * * * shall, upon the order of the Attorney General, be deported who—

* * * * *

(6) is or at any time has been, after entry, a member of any of the following classes of aliens:

* * * * *

(C) Aliens who are members of or affiliated with (i) the Communist Party of the United States; * * *.

* * * * *

(d) Applicability to all aliens.

Except as otherwise specifically provided in this section, the provisions of this section shall be applicable to all aliens belonging to any of the classes enumerated in subsection (a) of this section, notwithstanding (1) that any such alien entered the United States prior to June 27, 1952, or (2) that the facts, by reason of which any such alien belongs to any of the classes enumerated in subsection (a) of this section, occurred prior to June 27, 1952.

* * * * *

ber of the Communist Party within the meaning of the Act of October 16, 1918, as amended by Section 22 of the Internal Security Act of 1950, 64 Stat. 987, 1006 (*supra,* pp. 2-3).

1. *The proceedings*

On June 17, 1952, the District Director of the Immigration and Naturalization Service issued a warrant of arrest which recited that petitioner, who had entered this country on September 5, 1909, had been, after entry, a member of the Communist Party and was therefore subject to deportation (R. 5).[2] The warrant was served on September 12, 1952 (R. 5), and hearings were held before a special inquiry officer on May 11 and May 21, 1953 (R. 19). On June 30, 1953, the special inquiry officer specifically found that petitioner had been a member of the Communist Party during the years 1937 to 1939 and ordered his deportation (R. 17-18, 22-23, 47, 83, 95).

On petitioner's appeal from this order, the Board of Immigration Appeals found that the record established the stated ground of deportability by reasonable, substantial, and probative evidence, and accordingly dismissed the appeal on September 8, 1953 (R. 17-18, 83, 95).

On November 11, 1954, petitioner moved to reopen the proceeding in order that he might apply for suspension of deportation. This motion was denied on November 29, 1954, but, after being renewed, was

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[2] Since the Immigration and Nationality Act of 1952 was not enacted until later in June, and was not effective until December 1952, the warrant of arrest (and hence the proceedings as a whole) were instituted under the Act of October 16, 1918, as amended by Section 22 of the Internal Security Act of 1950.

granted on December 23, 1954 (R. 17-18, 84). On February 16, 1955, after a hearing, a special inquiry officer denied petitioner's application for suspension of deportation, finding that he had not made a "clean break" with the Communist Party and that there was reason to believe that he was still sympathetic with its principles. The Board of Immigration Appeals affirmed this order on May 13, 1955 (R. 17-23, 84).

While his application for suspension of deportation was pending, petitioner asked the District Court for a writ of habeas corpus, on December 13, 1954, alleging that the evidence against him did not support the order of deportation and that the statute under which the order was issued was unconstitutional in that it deprived him of due process under the Fifth Amendment, abridged his freedom of speech under the First Amendment, and was an *ex post facto* law and bill of attainder. After the order denying suspension of deportation was entered by the special inquiry officer on February 16, 1955, the petition for a writ of habeas corpus was amended to include the additional argument that the denial of suspension was arbitrary and capricious (R. 84, 95-96).

The District Court, after a hearing, denied the petition on March 2, 1956 (R. 84). *Niukkanen* v. *Boyd,* 148 F. Supp. 106 (D. Ore.). On February 8, 1957, the Court of Appeals affirmed. *Niukkanen* v. *Boyd,* 241 F. 2d 938 (C.A. 9). A petition for a writ of certiorari was denied on December 16, 1957 (355 U.S. 905), after this Court's decision of December 9, 1957, in *Rowoldt* v. *Perfetto,* 355 U.S. 115.

Thereafter, on December 27, 1957, petitioner sought administrative reconsideration of his status as a de-

portable alien. He claimed that the *Rowoldt* decision "so redefined the substantial and evidential requirements of membership in the Communist Party of the United States as to take petitioner out of the class of deportable aliens." This motion was denied by the Board of Immigration Appeals on March 26, 1958 (R. 9; see also R. 85).

Relying on this same ground, and renewing his contention that the statute is unconstitutional, petitioner instituted the instant judicial proceeding on April 4, 1958 (R. 3-16). After a hearing (R. 46-77), the District Court denied the petition on April 14, 1958 (R. 77-79, 81-86) and the Court of Appeals affirmed the order of the District Court (R. 99).

2. *The evidence and findings on deportability*

At the original administrative hearing commencing on May 11, 1953, in Portland, Oregon, petitioner (also known as Mackie) took the stand to confirm that he understood the nature of the charges against him, that he was born in Finland on November 24, 1908, and entered the United States in 1909, that he served 95 days in the United States Army, and that he had never been admitted to citizenship [3] (Tr. 1-9).[4] The government then called two witnesses, Walter R. P. Wilmot, a New York writer, and Lee Arthur Knipe, of Oregon.

(a). Wilmot testified that he had joined the Communist Party in Portland in 1936 or 1937 and had been very active in Party affairs until 1939 (Tr. 12, 13). He

[3] The examining officer produced a petition for naturalization which had been denied March 15, 1946, for "lack of prosecution" (Tr. 10).

[4] The transcript of the hearing before the Immigration and Naturalization Service will be referred to as "Tr. ."

described himself as having been the editor of the "Labor New Dealer" (Tr. 12), a weekly newspaper which was "Communist set-up and Communist controlled" (Tr. 15). In this capacity he attended meetings in Portland, Oregon, Seattle, Washington, and Aberdeen, Washington, of practically all branches of the Party (Tr. 13, 15).

Wilmot testified that he met petitioner in 1936 as "William Mackie" at the home of H. Burns, a Communist Party member and the secretary to Wilmot on the "Labor New Dealer" (Tr. 13, 18). At this meeting, Communist Party matters were discussed (Tr. 18). From this time until Wilmot was expelled from the Party in 1939, he knew petitioner as a member, seeing him many times. This included an occasion when he saw petitioner at party headquarters paying dues (Tr. 14, 45, 46). He saw petitioner's membership card at this time (Tr. 15, 46). He also encountered petitioner many times at the Party meetings which the witness attended three to four times a week for two years (two to three on the average which were closed to non-members) (Tr. 17, 31). The meetings were held in the Finnish Hall, at private homes, in the newspaper office, and at a library under assumed names (Tr. 31). The witness also saw petitioner at his newspaper office where petitioner came once or twice a month to aid in the circulation of the "Labor New Dealer" (Tr. 19, 20). The office was "like a branch office of headquarters" in that everything that dealt with Party matters was discussed there in a back-room closed to non-members. Petitioner took an active part in the discussions which covered Party aims and purposes, and ways of broadening the circulation of the newspaper as a Party organ (Tr. 20-22).

Wilmot further testified that petitioner attended a "plenum" in Aberdeen (Tr. 19). This was a closed meeting held for the purpose of reporting the activities of Party members in the Northwest (Tr. 19). Admission was by card presented at the door (Tr. 26). With respect to his own admission and that of petitioner, the witness said "These are the anointed people * * * When I showed up there or Mr. Mackie [petitioner], they knew who we were" (Tr. 27).

The witness said that the primary concern of his associates at this time was one leading toward revolution (Tr. 32). He said that petitioner belonged to "what we call the top fraction" of the Party (Tr. 27, 35). In his opinion, "Mackie knew where he was going" (Tr. 32).

On cross-examination, Wilmot admitted that he had been arrested and convicted for drunkenness during this period but noted that he had nevertheless held three jobs and worked sixteen hours a day (Tr. 47-50).

(b). The second witness, Lee Arthur Knipe, identified himself as having been a member of the Communist Party from 1937 to 1942, the Educational Director of Albina Branch, and a member of the County and State Executive Boards (Tr. 64, 65, 66). He testified that he had a personal association with petitioner who was also a Communist at this time (Tr. 70). He had seen petitioner pay dues and had seen his membership book several times (Tr. 69, 94, 95).

The witness said he first met petitioner at a closed Party meeting in Finnish Hall in 1937 (Tr. 66). Thereafter, he became a good friend of petitioner's (Tr. 73-74). He saw petitioner, who was a "good member" of the Albina Branch (Tr. 67) and who served on its execu-

tive board (Tr. 68), at meetings once each week (Tr. 67). The witness attended some thirty to thirty-five meetings at which petitioner was present (Tr. 67). The meetings were held in Finnish Hall and at homes of members (Tr. 67). The meetings at Finnish Hall were closed to all except members of the branch, about 25 or 35 members (Tr. 73). Petitioner attended at least three meetings in the home of the witness (Tr. 67).

Knipe said that discussions at the meetings involved matters contemplating an eventual revolution (Tr. 72). He testified that petitioner took an active part in discussions (Tr. 67), but noted that petitioner was not a Party intellectual—that he was more interested in bread and butter topics than in theory or political discussion (Tr. 75).

On direct examination, Knipe denied that he had been convicted of a felony (Tr. 64). On cross-examination, he was asked if he had ever been convicted for a violation of state law (Tr. 76). He answered with details about his arrest for violation of a traffic ordinance (Tr. 77). When counsel for petitioner indicated that he had reference to a conviction for forgery, objections and an off-the-record discussion ensued (Tr. 80). Knipe was then asked specifically if he had ever been convicted of a felony under state law (Tr. 80). He refused to answer on constitutional grounds (Tr. 80). The special inquiry officer ruled that he need not answer but informed counsel that he would consider the matter further (Tr. 81, 82). Some days later when the hearing resumed, Knipe took the stand at his own request and told of a 1929 conviction for forgery (Tr. 86), noted that he had thought it a misdemeanor because of the amount involved ($25.00), and explained

that he had not wanted the matter brought up because of his minor children (Tr. 87).

(c). At the conclusion of the government's evidence, petitioner produced several character witnesses and rested (Tr. 97-128). The inquiry officer, apprised that petitioner did not intend to testify, pointed out to petitioner and his counsel that a deportation proceeding was civil in nature and that refusal of an alien to answer questions properly put to him was legally significant.

The following colloquy took place (Tr. 128-129):

"Q. It means simply this. Two government witnesses who have appeared here have testified that they have seen you at closed meetings of the Communist Party. There has been no evidence to refute those statements and since you have refused to testify, it will have to be assumed that the statements made by those two witnesses are correct, since it has not been refuted.

"Mr. Lezak [counsel for petitioner]: I am advising Mr. Mackie at this time that he need make no further statements without consulting his attorney first."

At this time, counsel asked for a short recess during which he and petitioner left the room. Returning after five minutes, counsel said:

"After consulting with my client I have nothing further to offer."

The special inquiry officer then addressed petitioner:

"Q. Is there any statement you care to make for the record.* * *

"A. Well, everything has been said I guess, that has to be said.

"Q. There is nothing further, then, that you wish to add?

"A. Well, * * * I would make a good United States citizen if I got my citizenship papers * * * ."

(d). The special inquiry officer, on June 30, 1953, specifically found on the basis of this evidence that petitioner had been a voluntary member of the Communist Party during the years 1937-1939. With respect to the credibility of the witnesses, he noted that Wilmot had shown good response and keen intellect—that he had admitted drinking but not to the extent of impairing mental faculties or means of livelihood. The officer found that there was no reason to doubt the veracity of Knipe since he had adequately explained his reluctance to testify about his criminal conviction. He further noted petitioner's refusal to speak.

(e). The Board of Immigration Appeals (on September 8, 1953) dismissed the appeal on the ground that the record established deportability by reasonable, substantial and probative evidence. It observed that, while the credibility of the witness Knipe had been weakened because he "testified untruthfully", his testimony had been corroborated by another witness and that petitioner had not denied the correctness of this testimony (see R. 19).

3. *The evidence and findings on the application for suspension of deportation.*

(a). At the proceedings reopened on February 2, 1955, to permit petitioner to apply for suspension of deportation, he did take the stand (Tr. 184). He testified as to his early activities in various organizations. He readily recalled his membership in the Boy Scouts between 1921-1928 and the name of his scout-master (Tr. 195). He could not remember the specific years

when he was affiliated with the Finnish Federation, the Voima Sports Club, and the Unemployment Federation which he said was probably the Worker's Alliance (Tr. 195-196). He admitted that he had attended meetings and other events in Finnish Hall, having gone to the Hall the first time in 1929 or 1930 (Tr. 198, 199). He said that he had attended many meetings—"unemployment meetings, federation meetings and all kinds of meetings" (Tr. 199). He said he could not tell whether the meetings in Finnish Hall were Communist or not —that maybe they were and maybe not (Tr. 200). He admitted that he knew Lee Knipe, that he saw him maybe 150 times, but he did not remember when he first met him and did not want to make a definite statement as to whether he knew then or now whether Knipe was a member or officer in the Communist Party (Tr. 199-200). He said he did not know Wilmot and had never seen him before (Tr. 200). He denied that he had ever "knowingly" belonged, or paid money to, the Communist Party (Tr. 201, 203, 204). He said that he read the daily papers but mostly sports—not political news (Tr. 201-202).

On cross-examination, petitioner said again that he believed he had belonged to the Worker's Alliance but could not remember the specific years (Tr. 207, 208). He admitted recent activities with the Oregon Committee for the Protection of the Foreign Born (Tr. 213, 217, 222, 223, 226, 227) and said he had recently signed up for the Methodist Federation for Social Action (Tr. 216, 228). Asked who was present at meetings of the Oregon Committee for the Protection of the Foreign Born, he indicated that he did not want to give names and "make a person think I am trying to act as a

'stool pigeon' " (Tr. 217). Told that this was relevant to his application for suspension of deportation, he, after consultation with counsel, responded, explaining that the meetings centered around the McCarran-Walter Act (Tr. 222).

(b). The special inquiry officer, on February 16, 1955, denied petitioner's application for suspension of deportation. He found that, although it had been satisfactorily established that petitioner's deportation would result in unusual hardship to him, his citizen wife and step-son, that the case did not warrant suspension of deportation. He pointed out that petitioner was evasive as to his activities and associations during the period during which testimony had established he belonged to the Communist Party and contrasted his inability to recall events and people during 1930-1940 with his ready recall of earlier activities. Noting that it was a matter of policy not to grant suspension of deportation in these cases unless it had been established that the alien had made a "clean break" with the Communist Party, and in fact was actively opposed to its ideologies, he referred to petitioner's attitude as being reluctant to implicate other persons known by him to be Communists or to admit that he had been disillusioned by the Party or opposed to Communism. He noted that petitioner had turned for solace to the Oregon Committee for Protection of the Foreign Born and the Methodist Federation for Social Action.

(c). On May 13, 1955, the Board of Appeals dismissed an appeal, reviewing the entire record (R. 17). It noted, *inter alia*, petitioner's admitted affiliation with the Workers Alliance, his evasive and unresponsive testimony during the reopened hearing, and his reluc-

tance to give information as to persons attending a meeting of the Oregon Committee for the Protection of the Foreign Born. It held that there was an overwhelming amount of evidence to show that petitioner had been a member of the Communist Party, and concluded that there was nothing in the record to show that he had completely disassociated himself and no longer believed in its doctrines or principles (R. 17-23).

(d). On March 2, 1956, the District Court (*Niukkanen* v. *Boyd,* 148 F. Supp. 106), in dismissing the petition for a writ of habeas corpus, found *inter alia* that there was no basis for the contention that the denial of suspension of deportation was arbitrary and capricious. It noted that petitioner's testimony at this hearing was far from convincing. (It also found that the evidence adduced at the original immigration hearing was ample to support the findings of Party membership and disposed of contentions that the Act was unconstitutional, citing *Harisiades* v. *Shaughnessy,* 342 U.S. 580, and *Galvan* v. *Press,* 347 U.S. 522.) It recognized that deportation would cause hardship, and that the practice of deportation "bristles with severities", but observed that this was a matter solely for the responsibility of Congress.

As already indicated, the Court of Appeals affirmed on February 8, 1957 (241 F. 2d 938), for the reasons stated by the District Court, and this Court denied certiorari on December 16, 1957, 355 U.S. 905.

4. *The evidence and findings with respect to reopening on the basis of Rowoldt* v. *Perfetto*

(a). On March 26, 1958, the Board of Immigration Appeals, in denying petitioner's application for re-

opening on the basis of *Rowoldt* v. *Perfetto,* 355 U.S. 115, reviewed the evidence at both hearings; it considered the testimony regarding the extent of petitioner's activities and its credibility, the fact that he did not testify at the original hearing, and his evasive and unresponsive answers at the subsequent hearing on suspension of deportation. It concluded that "careful reconsideration of the entire record reveals an overwhelming amount of evidence" that petitioner was a member of the Communist Party from 1937 to 1939 and "that such membership on his part was a meaningful association and one which was not wholly devoid of political implications" (see R. 85).

(b). On the present petition for habeas corpus alleging *inter alia* that the finding of meaningful membership under *Rowoldt* was capricious, the District Court permitted petitioner to take the stand and produce character witnesses, although it indicated that it did not think petitioner was entitled to do so (R. 52, 60, 67). Petitioner again denied knowing Wilmot (R. 55). He denied a knowledge of Communism (R. 56, 62), said that the only thing he heard in 1938 and 1939 was not a "violent overthrow of the Government" but "more work and more food" (R. 62), denied that he had ever attended a plenum (R. 63), and admitted that he had belonged to the Worker's Alliance in 1937 (R. 63).

The District Court in its decision (R. 77, 81) noted that it had carefully reread the complete record and was convinced that petitioner did not come within the reach of *Rowoldt* (R. 81). It noted that petitioner, unlike Rowoldt whose truthfulness was unquestioned, had (since his first refusal to testify) consistently

denied membership in the Communist Party in the face of evidence to the contrary that he had been a top fraction member locally (R. 77, 82). It said that petitioner's testimony before it did not change its previous opinion that there was ample evidence to sustain the Board's findings, that it believed the testimony which established petitioner's membership in the Party and did not believe petitioner (R. 78, 83). The court expressed the opinion that the legislation under which deportation had been ordered was harsh but was outside the power of the court to consider. It concluded that there was no more merit in this petition than there was in the previous one,[5] and that the delay of some six years in this case "has been occasioned solely by Petitioner's resort to administrative and court proceedings to assert contentions which have been found to be without merit" (R. 85).

(c). The Court of Appeals, after reviewing the entire record, affirmed, concluding that the evidence of active participation by petitioner in a relatively high regional echelon of the Party "more than meets the minimum requirements of proof to establish Communist party membership, as set out in *Galvan* v. *Press,* and as referred to in *Rowoldt* v. *Perfetto* as 'meaningful association' " (R. 98).

SUMMARY OF ARGUMENT

I

In his latest attempt to prevent deportation, petitioner still attacks the sufficiency of the evidence to show that he was an alien who after entry became a

[5] This included disposition of the previously raised constitutional issues.

member of the Communist Party—a finding which has repeatedly been upheld on judicial and administrative review. His contention that his membership was not meaningful under this Court's decision in *Rowoldt* v. *Perfetto,* 355 U.S. 115, is without basis.

The proof shows that petitioner was a card-carrying, dues-paying, meeting-attending member of the Communist Party for some two years, and that he served on the local executive board and aided regularly in the distribution of a Communist-controlled newspaper. It shows further that he attended many closed meetings at which policy was discussed, that he took an active part in such discussions, and that he once attended an important regional meeting. These facts were unchallenged by petitioner at the original administrative hearing, despite urging that he meet the issue, and his subsequent testimony (on the application for suspension of deportation), which professed to deny membership, was so evasive and unresponsive as to incur disbelief. The proof was clearly sufficient to establish membership under the test of *Galvan* v. *Press,* 347 U.S. 522—that the alien of his own free will joined the Party aware that he was joining an organization known as the Communist Party which operates as a distinct and active political organization.

Rowoldt was a determination that the government's sole reliance on the testimony of that alien, which showed that he was preoccupied with purely economic sustenance, fell short of showing the necessary consciousness of political implications attendant upon meaningful Party membership. The instant case is clearly distinguishable. Consciousness of political affiliation here was more than adequately proved. It was

specifically spelled out by direct testimony that petitioner actually engaged in political discussions. There were likewise strong inferences to be drawn, as in many comparable cases, from petitioner's length of membership, his constant activity, and his position of at least local leadership.

II

The argument that the statute is unconstitutional as a bill of attainder likewise raises an issue which we believe to be firmly settled.

This Court in *Harisiades* v. *Shaughnessy,* 342 U.S. 580, and *Galvan* v. *Press, supra,* 347 U.S. 522, specifically found, and petitioner so admits,[6] that the legislation providing for deportation for past membership in the Communist Party does not offend the *ex post facto* clause or due process. Since the reasoning of these cases was based upon the well-established principle that deportation, no matter how harsh, is not punishment, it follows that these holdings necessarily dispose of the contention that the statute offends as a bill of attainder—which by definition is a legislative act inflicting *punishment* without a judicial trial.

A long history of judicial rulings upholds the right of Congress to name specific groups in deportation legislation. The present legislation was not enacted to *punish* ascertained individuals or classes but represented a considered Congressional judgment that the presence of alien residents who had previously been members of the Communist Party represented a danger to the welfare of the country.

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[6] Petitioner does not ask that *Harisiades* or *Galvan* be overruled or reconsidered (see Pet. Br. 7, 20).

ARGUMENT

In this second cycle of attacks carried through administrative and judicial tribunals, petitioner asks this Court to strike down an order of deportation issued initially some seven years ago and twice upheld by the District Court and the Court of Appeals. The issues which he now raises—the sufficiency of the evidence to show that he was an alien who after entry had become a member of the Communist Party, and the constitutionality of the Act in the light of the bill of attainder provision of the Constitution—are the precise issues which he raised in his prior petition for certiorari to this Court. See *Niukkanen* v. *Boyd,* No. 992, O.T. 1956, renumbered No. 121, O.T. 1957, certiorari denied, 355 U.S. 905. No new evidence has been adduced and petitioner's legal status remains unchanged. We submit that he has shown no valid reason for disturbing the affirmance of the judgment below.

I

The Evidence Established that Petitioner's Membership in the Communist Party was Meaningful

A. The crucial question is whether petitioner has been shown to have been a member of the Communist Party so as to render him subject to deportation under Section 22 of the Internal Security Act of 1950. The test of membership was set out in *Galvan* v. *Press,* 347 U.S. 522, where this Court, urged to construe the Act as providing for the deportation only of aliens who joined the Communist Party fully conscious of its advocacy of violence, said (at pp. 528-529):

> It must be concluded, therefore, that support, or even demonstrated knowledge, of the Communist

> Party's advocacy of violence was not intended to be a prerequisite to deportation. It is enough that the alien joined the Party, aware that he was joining an organization known as the Communist Party which operates as a distinct and active political organization, and that he did so of his own free will. * * *

Applying this test, the Court sustained the hearing officer's finding that Galvan had been a "member" of the Communist Party from 1944 to 1946 on the basis of admissions, subsequently denied, that he had joined the Party, attended meetings, and refrained from applying for citizenship for fear of exposing such membership, and on testimony of a witness that Galvan had been an officer of the Spanish Speaking Club, an alleged Communist Party unit. The Court noted that there had been no claim that membership was obtained "accidentally, artificially, or unconsciously in appearance only" (347 U.S. at 528), and concluded that the record did not show a relationship to the Party so "nominal" as not to make Galvan a "member" within the terms of the Act. 347 U.S. at 529.

This test of membership was reaffirmed in *Rowoldt* v. *Perfetto,* 355 U.S. 115, where the majority of the Court (speaking through Mr. Justice Frankfurter) observed (at p. 120): "There must be a substantial basis for finding that an alien committed himself to the Communist Party in consciousness that he was 'joining an organization known as the Communist Party which operates as a distinct and active political organization * * *'. 347 U.S. at 528"; see also the dissenting opinion, 355 U.S. at 125. In that case, however, the Court found the evidence too insubstantial to show such membership—evidence based upon the sole testimony of Ro-

woldt, that, while he had belonged to the Communist Party for a year in 1935, he viewed the Party as having one aim, "to get something to eat for the people" (355 U.S. at 117). In view of this unchallenged testimony, accompanied by statements that membership had been motivated by a "fight for something to eat and clothes and shelter" and "fighting for the daily needs", the Court declined to say that this was the "meaningful association" contemplated by the statute. The Court pointed out that from this account, "*which is all there is,* the dominating impulse to his 'affiliation' with the Communist Party *may well have been* wholly devoid of any 'political' implications" and noted that "The differences on the facts between *Galvan* v. *Press, supra,* and this case are too obvious to be detailed". 355 U.S. at 120 and 121 (emphasis added).

That *Rowoldt* did not seek to alter the test of membership announced in *Galvan* is clear, not only from the specific affirmation of that earlier ruling, but also from the reference to the distinction in the facts between the two cases. The Court in *Rowoldt* applied the principles announced in *Galvan* to a different factual situation.[7] Petitioner seeks to read *Rowoldt* as carving out an exception to the *Galvan* rule based upon an alien's motivation for joining the Party or the extent and character of his activity (Pet. Br. 17-19). We do not read *Rowoldt* as so holding. It went no further than to rule

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[7] Almost immediately after the decision in *Rowoldt*, the Court denied petitions for writs of certiorari in cases with comparable facts raising the issue of sufficiency of proof to show more than nominal membership (petitioner's case, No. 992, O.T. 1956, certiorari denied, 355 U.S. 905); *United States ex rel. Avramovich* v. *Lehmann*, 355 U.S. 905; and *Rystad* v. *Boyd*, 355 U.S. 912 (see pp. 26-27, *infra*).

that the government there—relying as it did solely upon Rowoldt's testimony, replete with references to the fight for the necessities of life—had failed to show an "awareness" of the political character of the Communist Party, the essential element of the test of *Galvan*. The Court's finding, that on the basis of the unchallenged evidence it could not say that Rowoldt had a meaningful association with the Party since his affiliation may well have been devoid of political implications, was in effect a ruling that the proof had failed to show a consciousness that the Communist Party operated as a political organization.

B. Some lower courts have specifically noted that *Rowoldt* represents no change in the law with respect to proof of membership. *Schleich* v. *Butterfield,* 252 F. 2d 191 (C.A. 6), certiorari denied, 358 U.S. 814; see the opinion below at R. 96. And all lower court rulings since *Rowoldt* have considered the total evidence in determining whether there was substantial basis for a finding of consciousness by the alien that he was joining an organization known as the Communist Party which operates as a distinct and active political organization. See, *e.g., Wellman* v. *Butterfield,* 253 F. 2d 932 (C.A. 6); *Williams* v. *Mulcahey,* 253 F. 2d 709 (C.A. 6), certiorari denied, 356 U.S. 946; *Schleich* v. *Butterfield, supra.*

The cases which have found membership so nominal or meaningless as not to be within the statute have turned upon considerations bearing on consciousness. In *Diaz* v. *Barber,* 261 F. 2d 300 (C.A. 9), an old alien laborer, who could neither read nor write and who gave confused conflicting statements about his affiliation

and extent of activity with the Party, was characterized as a "small rabbit in the Communist hutch" by the court below, relying on *Rowoldt.* And in *Bovinas* v. *Savoretti,* 146 F. Supp. 274 (S.D. Fla.), evidence that an alien who joined the Socialist Party in 1917, and who was unaware that this organization was encompassed by the Communist Party in 1922 or 1923, was found to be too nominal and innocent to establish membership under *Galvan,* citing *Colyer* v. *Skeffington,* 265 Fed. 17, 72 (D. Mass.). See also *Baghdasarian* v. *United States,* 220 F. 2d 677, where the Court of Appeals for the First Circuit vacated a judgment cancelling naturalization alleged to be fraudulently procured by an alien who denied membership in the Communist Party on the grounds that her membership had been acquired when her husband enrolled her, and this fact, coupled with her inactivity, made her membership too nominal, within *Galvan,* to show that she joined the Party.

C. In the present case, the administrative authorities were fully warranted in accepting the government's testimony which petitioner did not even undertake to deny at the original hearing despite the warning of the hearing examiner that, in the absence of refutation, the testimony would be assumed to be true. Petitioner's subsequent denial of any membership in the Communist Party in his application for suspension of deportation could, in the face of this testimony, properly be rejected as untruthful. Thus the case must be judged, with relation to the issue of meaningful membership in the Party, on the evidence of peti-

tioner's activities as described by the witnesses for the government.[8]

As the Statement, *supra,* pp. 6-11, shows, the proof at the deportation hearing was that petitioner was an active, card-carrying, dues-paying member of the Communist Party who regularly attended meetings limited to Communist Party members at which Party policies were discussed. He assisted in the distribution of the Communist-controlled trade union newspaper and participated in discussions which Party members held in the back room of the newspaper, relating to Party policy; at one time he attended a regional "plenum meeting. From this evidence, the administrative fact-finders could properly conclude that petitioner was wholly aware of the Communist Party's political character.

"Awareness" of the character of an entity is of course subjective. But its existence in relation to the problem here—the knowledge of the political character of an organization—may be proved in several ways (in the absence of a direct admission). Testimony may show that the "member" spoke with knowledge or that direct information was imparted to him; and inferences may be drawn from the length of time of his affiliation, his age, education and degree of sophistication, the extent and character of his participation and activity, and his refusal to rebut testimony. Motivation or degree of activity is but one part of the

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[8] It has some significance that the District Court, which also heard petitioner's denial of Communist Party membership (see *supra,* p. 15), stated that it did not believe petitioner's testimony (R. 78). The court also said that it believed that the testimony of Wilmot and Knipe at the administrative hearing was true (R. 78).

picture. It is the total evidence which must be examined.

The evidence did more than establish petitioner as a card-carrying Party member who regularly attended meetings over a period of some two years ending in 1939[9]; it described him as a fairly important member, belonging to the "top fraction"[10]—one who was known even at a regional meeting. It disclosed that he was a "good member" of his branch who served on the local executive board, and an "active member", not only with respect to regular attendance at meetings but in the dissemination of Communist news and the discussion of Party policy. There was no evidence that he was obsessed with economic necessity or any other consideration to the extent that it might have made him oblivious to political implications. It is true that Knipe characterized petitioner as being not a Party intellectual but "more interested" in "bread and butter" topics. However, one may be an active, knowing member of an organization without being among its theoreticians. There was testimony that petitioner did take an active part in discussions of Party aims and purposes and that he "knew where

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[9] The fact that there is no evidence of petitioner's Party membership after 1939 may well have a significance other than that petitioner left the Party at that time. In *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 593, the Court pointed that, after the decision in *Kessler* v. *Strecker*, 307 U.S. 22, in 1939, the "reaction of the Communist Party was to drop aliens from membership, at least in form, in order to immunize them from the consequences of their party membership."

[10] The contradiction in the testimony of the two witnesses which petitioner points to (Pet. Br. 18) is non-existent. Wilmot later corrected the erroneous impression which he conveyed that petitioner was a "functionary" (Tr. 15, 35).

he was going." Certainly this characterization is believable in view of the testimony regarding the many closed meetings that both witnesses said petitioner attended at which policy discussions took place.

This evidence on the issue of consciousness is more specific than the comparable evidence in *Galvan* v. *Press,* where awareness was inferred from the alien's admission, later denied, that he had refrained from applying for naturalization for fear of exposing his Party membership, and from the testimony of a witness that he had been an officer of the Spanish Speaking Club. Here, there was also testimony that petitioner actually engaged in political discussions—that he listened to many such discussions at the closed meetings he attended. Moreover, the details regarding petitioner's local leadership and constant participation make the proof comparable to that of the lower court cases since *Rowoldt* which have found, on evidence of a participant's status and activity, that he could not have been ignorant of the general means, aims, and ideals of the Communist Party. See *Wellman* v. *Butterfield,* 253 F. 2d 932 (C.A. 6); *Williams* v. *Mulcahey,* 253 F. 2d 709 (C.A. 6), certiorari denied, 356 U.S. 946; *Schleich* v. *Butterfield,* 252 F. 2d 191 (C.A. 6), certiorari denied, 358 U.S. 814; *Fougherouse* v. *Brownell,* 163 F. Supp. 580 (D. Oreg.); see also *United States ex rel. Avramovich* v. *Lehmann,* 235 F. 2d 260 (C.A. 6), certiorari denied (following *Rowoldt*), 355 U.S. 905. The proof is stronger than that in *Rystad* v. *Boyd,* 246 F. 2d 246 (C.A. 9), certiorari denied (following *Rowoldt*), 355 U.S. 912, where the evidence established simply that the alien was a card-carrying, dues-paying, meeting-

attending member of the Communist Party and the alien, like petitioner here, produced no evidence.[11]

Moreover, unlike *Rowoldt,* petitioner did not undertake to explain his participation in the Communist Party as stemming from or involving considerations other than those which would normally be inferred from the proof that he was a dues-paying, card-carrying, active, working member of the Party. Even when he testified in his own behalf at the suspension hearing he did not say that he joined the Party thinking it was a non-political organization; rather, he testified that he did not join at all. Under either of these circumstances (silence or negation), the trier of fact, on finding membership, had a right to believe that petitioner had no evidence to combat the inference of meaningful membership which would be the normal one to be drawn from the activities described by the government witnesses. Cf. *United States ex rel. Bilokumsky* v. *Tod,* 263 U.S. 149; *United States ex rel. Vajtauer* v. *Commissioner of Immigration,* 273 U.S. 103; *Rystad* v. *Boyd, supra,* 246 F. 2d 246 (C. A. 9), certiorari denied, 355 U.S. 912; *Ocon* v. *Guercio,* 237 F. 2d 177 (C. A. 9); *Quilodran-Brau* v. *Holland,* 232 F. 2d 183 (C.A. 3); *United States ex rel. Zapp* v. *District Director of Immigration and Naturalization,* 120 F. 2d 762 (C.A. 2); *United States* v. *DeLucia,* 163 F. Supp. 36 (N.D. Ill.), affirmed, 256 F. 2d 487 (C.A. 7), certiorari denied, 358 U.S. 836; *DaCosta* v. *Holland,* 151 F. Supp. 746 (E.D. Pa.); *Vlisidis* v. *Holland,* 150 F. Supp. 678 (E.D.

[11] The Board of Immigration Appeals advises that it has reexamined some twenty-five cases on the basis of *Rowoldt,* some upon its own motion. Of these, four have been terminated favorably to the alien, six were denied relief, and fifteen, at last count, were still pending.

Pa.), affirmed, 245 F. 2d 812 (C.A. 3); *Williams* v. *Butterfield,* 145 F. Supp. 567 (E.D. Mich.), affirmed, *Williams* v. *Mulcahey,* 250 F. 2d 127 (C.A. 6), certiorari denied, 356 U.S. 946; *Caetano* v. *Shaughnessy,* 133 F. Supp. 211 (S.D. N.Y.).

Intent or awareness is a matter peculiarly within the knowledge of the alien. Even in criminal cases, under these circumstances, the burden may be cast on the party having knowledge to present evidence of such facts, whether the proposition is an affirmative or a negative one. See *Yee Hem* v. *United States,* 268 U.S. 178; *Casey* v. *United States,* 276 U.S. 413, 418; *Rossi* v. *United States,* 289 U.S. 89; Wharton's *Criminal Evidence* (12th ed. 1955), Section 14. Here, the government produced evidence of activities fully supporting the conclusion that the alien was aware of the political character of the Communist Party, and the petitioner produced no evidence (other than his own unsatisfactory denial of membership) that he was unaware of the political character of the Party. The requirements of the statute have thus been met.[12]

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[12] The District Court and the Court of Appeals have twice upheld the administrative findings, the second time being after (and in the light of) *Rowoldt.* Their opinions and statements indicate that those courts have made a fair assessment of the record—the case has been gone into most thoroughly by both c rts—and have applied the proper statutory tests. There is therefore no occasion for further consideration by this Court of the administrative findings. See *Peurifoy* v. *Commissioner,* 358 U.S. 59, 61; *Federal Trade Commission* v. *Standard Oil Co.,* 355 U.S. 396, 400-401; *Labor Board* v. *Pittsburgh S.S. Co.,* 340 U.S. 498, 502-503. See also *supra,* p. 19.

II

The Statute does not Violate the Bill of Attainder Clause of the Constitution

Petitioner argues that Section 22 of the Internal Security Act of 1950 violates the bill of attainder provision of Article I, Section 9, Clause 3, of the Constitution. He expressly concedes (Pet. Br. 7) that all other constitutional issues involving this statute were settled by this Court in *Galvan* v. *Press,* 347 U.S. 522, and *Harisiades* v. *Shaughnessy,* 342 U.S. 580—and does not ask that those decisions be overruled or reconsidered (see Pet. Br. 7, 20) [13]—but argues that this precise issue has never been passed upon by this Court.

It is the government's position that, while the Court in *Galvan* did not expressly mention the bill of attainder clause in its decision, its holding (like the previous ruling in *Harisiades*)—that a statute providing for deportation for past membership in the Communist Party (even though the alien might have been unaware of the Party's advocacy of violence) does not offend the *ex post facto* clause or due process—necessarily disposed of the contention that it is a bill of attainder. This conclusion is buttressed by the fact that the issue now raised was briefed at length in *Galvan* (No. 407, O.T. 1953, Brief for Petitioner, pp. 53-57; Brief for Respondent, pp. 63-66).

A bill of attainder is a legislative act inflicting punishment without a judicial trial. *United States* v. *Lovett,* 328 U.S. 303, 315. As the Court has held again

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[13] The government's arguments on the constitutionality of the statute are set forth in detail in our briefs in *Harisiades* and *Galvan,* and in our Supplemental Brief for the Respondent on Reargument in *Rowoldt* (No. 5, O.T. 1957).

and again, deportation may be harsh, drastic, and severe, but it is not a criminal proceeding and it is not a punishment. *Carlson* v. *Landon,* 342 U.S. 524, 537; *Harisiades* v. *Shaughnessy,* 342 U.S. 580, 594-595. See also *Mahler* v. *Eby,* 264 U.S. 32, 39; *Fong Yue Ting* v. *United States,* 149 U.S. 698, 709, 730; *Bugajewitz* v. *Adams,* 228 U.S. 585, 591; *Wong Wing* v. *United States,* 163 U.S. 228, 237. The bill of attainder cases *(Cummings* v. *Missouri,* 4 Wall. 277; *Ex parte Garland,* 4 Wall. 333), on which reliance is placed, have been explained by the Court as proceeding "from the view that novel disabilities there imposed upon citizens were really criminal penalties for which civil form was a disguise" and "have never been considered to govern deportation," *Harisiades* v. *Shaughnessy,* 342 U.S. at 595. And the specific holdings in *Harisiades, Marcello,*[14] *Galvan, Catalanotte,*[15] *Carson,*[16] *Mahler,* and *Bugajewitz* that deportation is not a punishment for the purpose of the *ex post facto* clause, also dispose of the contention that a deportation statute can be a bill of attainder which necessarily inflicts punishment. See the concurring opinion in *United States* v. *Lovett,* 328 U.S. at 323.

Moreover, deportation is one legislative field in which there is a long history of naming specific groups—especially the Chinese and the anarchists. Of the Chinese deportation cases, *Wong Wing* v. *United States,* 163 U.S. 228, contrasting deportation of the Chinese and their punishment by imprisonment, most aptly demonstrates the inapplicability of the bill of at-

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[14] *Marcello* v. *Bonds,* 349 U. S. 302.

[15] *Mulcahey* v. *Catalanotte,* 353 U.S. 692.

[16] *Lehmann* v. *Carson,* 353 U.S. 685.

tainder clause to deportation. A resident alien Chinese was summarily sentenced to 60 days at hard labor and then ordered deported, under the statute involved in *Fong Yue Ting* v. *United States,* 149 U.S. 698, for having been found in the United States without a certificate of residence. The sentence of imprisonment was condemned as punishment without a judicial trial. "It is not consistent with the theory of our government that the legislature should, after having defined an offence as an infamous crime, find the fact of guilt and adjudge the punishment by one of its own agents." 163 U.S. at 237. But the deportation of Chinese was upheld, following *Fong Yue Ting* on the ground that "No limits can be put by the courts upon the power of Congress to protect, by summary methods, the country from the advent of aliens whose race or habits render them undesirable as citizens, or to expel such if they have already found their way into our land and unlawfully remain therein." 163 U.S. at 237. Deportation was not to be considered as punishment.

Even if, despite this history and the Court's prior rulings, each deportation provision is to be individually tested to see whether it is an attempt to inflict punishment, Section 22 is valid. *Harisiades* establishes that there is a sufficient connection between past membership in the Communist Party and present desirability as a resident for Congress to take action to expel such aliens, not as punishment, but in order to rid the country of a potential threat. 342 U.S. at 590-591, 595-596. That is what Congress sought to do in the 1940 Act and also in the 1950 legislation. The legislative history of both statutes establishes that Congress thought the residence in this country of aliens who had

previously been members of the Communist Party was undesirable and dangerous. See *Harisiades,* 342 U.S. at 590; *Galvan,* 347 U.S. at 529. There was no purpose or attempt to punish. The history of the provision extends over a period of more than 40 years and this history shows that it is a direct method of accomplishing the Congressional objective of terminating the residence of such aliens, not an indirect attempt to reach some other result. Five distinct Congresses, in 1918, 1920, 1940, 1950, and 1952, have legislated in this field. It cannot be said that this law was enacted, as were the Civil War statutes and the one involved in *United States* v. *Lovett,* 328 U.S. 303, to *punish* ascertained individuals or classes. Rather, the statute is a deliberate Congressional judgment that a particular class of aliens represents a danger to the welfare of the country and that its license to remain here should be revoked. Cf. *Hawker* v. *New York,* 170 U.S. 189, 196-197.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment below should be affirmed.

J. LEE RANKIN,
Solicitor General.

MALCOLM R. WILKEY,
Assistant Attorney General.

BEATRICE ROSENBERG,
JULIA P. COOPER,
Attorneys.

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MOTION

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IN THE

Supreme Court of the United States

October Term, 1959

No. 130

WILLIA NIUKKANEN, also known as WILLIAM NIUKKANEN, also known as WILLIAM ALBERT MACKIE,

Petitioner,

v.

EUGENE D. McALEXANDER, Acting District Director, District 31, Immigration and Naturalization Service,

Respondent.

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

OSMOND K. FRAENKEL,
120 Broadway,
New York, N. Y.,

LEONARD B. BOUDIN,
25 Broad Street,
New York 4, N. Y.

JOHN COUGHLAN,
220 Second & Cherry Building,
Seattle 4, Wash.,

SIEGFRIED HESSE,
2225 Parker Street,
Berkeley, Calif.

Attorneys for the National Lawyers Guild, Amicus Curiae.

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IN THE

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No. 130

/ILLIA NIUKKANEN, also known as WILLIAM NIUKKANEN, also known as WILLIAM ALBERT MACKIE,
Petitioner,

v.

UGENE D. MCALEXANDER, Acting District Director, District 31, Immigration and Naturalization Service,
Respondent.

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

The National Lawyers Guild moves for leave to file a rief as amicus curiae.[1] This application is made because etitioner's brief is limited to a discussion of only two spects of the case: (1) Whether 8 U. S. C. § 1251 a) (6) (C)[2] violates the Constitution by reason of being

[1] While the time to file this brief has expired, it is believed that he importance of the issues justifies the granting of the motion.

[2] The warrant of arrest upon which the proceedings in this case re based was issued prior to the passage of Section 241 of the mmigration and Nationality Act of 1952, 66 Stat. 163, 205, the ection referred to in the petition and brief. Apparently these proeedings are based on Section 22 of the Internal Security Act of 950, 64 Stat. 987, 1006, as amended by Section 1 of the Act of March 8, 1951, 65 Stat. 28, which was repealed by, but substantially eenacted in, the Immigration and Nationality Act of 1952, 8 J. S. C., Sec. 1251(a)(6)(C). In any event, the position urged n this brief would be equally applicable to Section 241(a)(6)(C) f the 1952 Act, and to Section 22 of the Internal Security Act. See *Niukkanen* v. *McAlexander,* 265 F. 2d 825, n. 1.

a bill of attainder (Petitioner's Brief, 7); and (2) Whether petitioner's alleged association with the Communist Party * * * was "meaningful" and "political" within the rule of *Rowoldt* v. *Perfetto,* 355 U. S. 115 (Petitioner's Brief, 3, 17).

Certiorari was sought and granted, however, upon the broader grounds of asserted unconstitutionality of the statute as violative of due process, as infringing the freedom of speech, and as being an *ex post facto* law (Pet. for Cert., 3, 5).[3] Since this Court's decision in *Harisiades* v. *Shaughnessy,* 342 U. S. 580, and *Galvan* v. *Press,* 347 U. S. 522, extensive legal research, to be referred to and discussed in the appended brief, is believed to justify amicus curiae in urging a reconsideration of the constitutional issues underlying these two decisions, and the decision of the Court in *Carlson* v. *Landon,* 342 U. S. 524. Counsel believe it can be demonstrated that, while broad and sweeping language has been used by the Court on occasion to uphold the exclusion and deportation of aliens in particular cases, and while it has been suggested that the power of Congress with respect to the deportation of aliens is unlimited except for the requirements of procedural due process, the asserted power of *banishment,*[4] as distinguished from the power of *delayed exclusion, i.e.* "ejection", is of relatively recent origin.

Counsel further believe that the appended brief may be of assistance to the Court in considering the question

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[3] See *Niukkanen* v. *Boyd,* 241 Fed. 2d 938 (9th Cir. 1957), affirming without opinion 148 Fed. Supp. 106 (D. C., Ore. 1956); cert. den. 355 U. S. 905.

[4] "Banishment", as here used, is intended to refer solely to the expulsion of the lawfully admitted long term resident alien as distinguished from the expulsion of an alien who either entered illegally, or who, within a reasonable time after entry, committed acts justifying a conclusion that his entry was erroneously permitted. The latter situation is hereinafter termed "ejection".

of whether the expulsion of a long term lawfully admitted alien—banishment—is punishment. While the constitutional implications of this question are raised by petitioner in the discussion of what constitutes a "bill of attainder" (Petitioner's Brief, 14), it is believed that the appended discussion may be of additional assistance to the Court.

The correct constitutional determination of the issues presented upon this petition are of importance not only to the millions of lawfully admitted permanent resident aliens, but also, and perhaps primarily, to the nation as a whole in its relationship to the world family of nations. Banishment is "universally decried by civilized people", *Trop* v. *Dulles*, 356 U. S. 86, 102 (opinion of Warren, C.J.). While the position here sought to be presented by amicus curiae is a constitutional position, not a policy question, the results of the determination may be far-reaching. Certainly the importance of this issue justifies a reconsideration of the *Carlson, Harisiades* and *Galvan* cases.

The National Lawyers Guild, a national bar association particularly concerned with the preservation and extension of constitutional civil liberties, is concerned that in an area where basic human rights and the disposition of human lives are deeply involved, the most searching constitutional analysis should be applied and reapplied to a procedure which repeatedly produces results universally recognized as inhumane, harsh, brutal and shocking.

For these reasons the National Lawyers Guild moves for leave to file the following brief as amicus curiae.[5]

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[5] The written consent of petitioner to the filing of this amicus brief has been obtained. The consent of respondent has been denied by letter, a copy of which *amicus curiae* is filing with this brief.

BRIEF OF *AMICUS CURIAE*

Preliminary Statement of the Case

Section 22 of the Internal Security Act of 1950, 64 Stat. 987, 1006, provides for the deportation of any alien who at any time has been a member of the Communist Party. Petitioner entered the United States in 1909 at the age of ten months. He has resided in this country continuously since his entry. He had brief but honorable service in the United States Army during the Second World War. He is the head of a family consisting of his citizen wife and her sixteen year old son by former marriage. (*Niukkanen* v. *McAlexander,* 265 F. 2d at 826).

After an administrative hearing in deportation proceedings commenced in 1952, a special inquiry officer determined that he was deportable as one who had been a member of the Communist Party during the years 1937 to 1939 (265 Fed. 2d at 826). Petitioner, testifying in his own behalf, categorically denied that he had ever been a member of the Communist Party. However, in the view of the Court below "the evidence more than meets the minimum requirements of proof to establish Communist Party membership * * * " (265 Fed. 2d at 829).

POINT I

Application of the statute has resulted here in a judgment of banishment against petitioner, which exceeds the inherent constitutional limits of the power to expel.

While it has been said the "Government's power to terminate its hospitality has been * * * sustained by this Court since the question first arose," *Harisiades* v. *Shaughnessy,* 342 U. S. 580, 587, a careful analysis of the cases

relied on in that case,[6] taking into consideration their particular facts, the historical and statutory setting in which they arose, the contentions advanced by the parties, and the issues which divided the Justices in their determination, reveals that in each such case, the Court was dealing with what was, in effect, "delayed exclusion". That is, the alien was ejected upon determination of facts which showed, or which were conclusively presumed to show, that his habits, characteristics, conditions, or circumstances as at the time of entry, or the manner of his entry, would have, if known at the time, justified exclusion.

Thus in *Fong Yue Ting* v. *United States,* 149 U. S. 698, a Chinese was deported because he had not complied with a condition imposed on the entry of Chinese, namely, that they obtain certificates of residence.

Lem Moon Sing v. *United States,* 158 U. S. 538, was an exclusion case.

Li Sing v. *United States,* 180 U. S. 486, involved a Chinese whose entry was fraudulent.

Fok Young Yo v. *United States,* 185 U. S. 296, The *Japanese Immigration* Case, 189 U. S. 86, and *United States* v. *Ju Toy,* 198 U. S. 253, were also exclusion cases.

In *Zakonaite* v. *Wolf,* 226 U. S. 272, *Tiaco* v. *Forbes,* 228 U. S. 549, and *Bugajewitz* v. *Adams,* 228 U. S. 585, the basic question was not reconsidered, in different terms.

Indeed, when the first case arose which might properly be considered a deportation case, *Pearson* v. *Williams,* 202 U. S. 281, the order was sustained solely on the theory that the original entry was only conditional and could be revoked on a showing that the alien never should have been admitted. It is significant that nowhere in Justice Holmes' opinion in that case does he rely on the general power to banish.

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[6] These are cited in footnote 11, 342 U. S. 587.

Moreover, such analysis indicates that the constitutional delegation of power believed to sustain deportation statutes was implied from the power to exclude; and that the power to exclude derived primarily from the express delegation of power to regulate commerce with foreign nations. *Ekiu* v. *United States,* 142 U. S. 651, 659.

Thus, just as Congress has the power to maintain control over the importation of goods prior to their merging with the domestic economy, *Hilton* v. *Merritt,* 110 U. S. 97, so also it had "the power to retain control over aliens *long enough to make sure of the facts.*" *Keller* v. *United States,* 213 U. S. 138, 149-50 (dissenting opinion of Mr. Justice Holmes; emphasis added).

The essence of the position here presented is set forth in the opinion in *Keller,* just referred to, and which is quoted at some length to provide an understanding of Mr. Justice Holmes' true position.

> "For the purpose of excluding those who unlawfully enter this country Congress has power to retain control over aliens long enough to make sure of the facts * * * To this end *it may make their admission conditional* for three years * * * If the ground of exclusion is their calling, practice of it within a short time after arrival is, or may be, made evidence of what it was when they came in. Such retrospective presumtions are not always contrary to experience or unknown to the law * * * If a woman were found living in a house of prostitution within a week of her arrival, no one, I suppose, would doubt that it tended to show that she was in the business when she arrived. But how far back such an inference shall reach is a question of degree like most of the questions of life. And, while a period of three years seems to be long, I am not prepared to say, against the judgment of Congress, that is too long.
>
> "[I]t is fair to observe that the presumption * * * is not open to rebuttal. I should be prepared to accept even that, however, in view of the difficulty of proof in such cases. Statutes of which the justifi-

> cation must be the same are familiar in the States. * * * It is true that * * * [ordinarily] in such instances the legislature has power to change the substantive law of crimes, and it has been thought that when it is said to create a conclusive presumption as to a really disputable fact, the proper mode of stating what it does * * * is to say that it has changed the substantive law. * * * This may be admitted without denying that considerations of evidence are what lead to the change. And if it should be thought more philosophical to express this law in substantive terms, I think that Congress may require, as a condition of the right to remain, good behavior for a certain time, in matters deemed by it important to the public welfare and of a kind that indicates a preexisting habit that would have excluded the party if it had been known. * * * "

We submit that the position outlined by Mr. Justice Holmes in *Keller* correctly and succinctly defines the proper source and limit of Congressional power. Most of the actual deportations which have been approved in this Court are consistent with this "conditional entry" principle, although the statutes upon which they have been based and the Court's language in sustaining them have tended to blur and obscure the constitutional source of the power to deport. Only in recent decisions has the Court approved actual *banishment*: that is, the expulsion of a lawfully admitted permanent resident alien for causes which cannot be rationally related to circumstances or conditions which may be presumed to have existed at or prior to entry.[7]

Harisiades and *Galvan* were the first and last decisions of this Court to approve banishment in the face of a constitutional challenge. Thus, while the language of previous

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[7] *Costanzo* v. *Tillinghast*, 287 U. S. 341, was the first of the decisions in which the Court clearly upheld banishment, in the sense that Costanzo had entered as a child. He was deported for operating a house of prostitution as an adult. "A claim of violation of constitutional rights made in the court below (was) * * * abandoned." 287 U. S. at 342.

decisions seems consistent with the opinions in those cases, the ultimate decisions are a significant departure in fact, if not in theory, from previous decisions of the Court.

A re-examination of the source and limits of the constitutional power sought to be exercised in the expulsion of lawfully admitted, permanently resident aliens should be undertaken by this Court. The application of the "conditional entry" theory of the constitutional power to deport would reaffirm the full control of Congress over the immigration, and recognize power to remove those entrants who, within a reasonable time after entry are found to be undesirable. At the same time, the shocking brutality of banishment of lifetime resident aliens will be prevented.

The demonstration of what is believed to be this gradually developed, but now fully matured error as contrasted to the position of Mr. Justice Holmes has been the subject of research and analysis on the part of one of the signatories of this brief, involving several years. This has been, and is being published in a recent and the forthcoming issue of Yale Law Journal under the title, *The Constitutional Status of the Lawfully Admitted Permanent Resident Alien.*[8] Forty reprints of the article will be available as soon as the December issue of the Yale Law Journal is printed, and they will be submitted to the Clerk to be incorporated by reference as a part of this brief.

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[8] Hesse, *The Constitutional Status of the Lawfully Admitted Permanent Resident Alien*: The Pre-1917 Cases, 68 Yale L. J. 1578, which will hereinafter be cited, Hesse, The Pre-1917 Cases, 68 Yale L. J. 1578; and Hesse, *The Constitutional Status of the Lawfully Admitted Permanent Resident Alien*: *The Inherent Limits of the Power to Expel*, 69 Yale L. J. —, to be published in December, and which will hereinafter be cited as Hesse, The Inherent Limits of the Power to Expel.

POINT II

Deportation of a lawfully admitted permanent resident alien for conduct having no relationship to any circumstance of his entry, or to his condition, habits, or character at the time of entry, in fact constitutes punishment.

Such deportation has been described as harsh, cruel and inhumane as any punishment practiced in a civilized nation. *U. S. ex rel. Klonis* v. *Davis,* 13 F. 2d 630, 631 (2nd Cir., 1926). The applicability of Article 1, section 9 of the Constitution, prohibiting *ex post facto* laws, and bills of attainder, and of the Eighth Amendment, prohibiting cruel and unusual punishment, is to be determined by the nature and relationship of the sanction imposed to the end sought to be accomplished, *i.e.,* whether regulatory and compensatory, or primarily punitive. *United States* v. *Lovett,* 328 U. S. 303; cf. *Speiser* v. *Randall,* 357 U. S. 513.

At least in the case of those ordered deported for conduct not shown to be anything but innocent when engaged in, cf. *Schware* v. *Board of Bar Examiners,* 353 U. S. 232, 244-46, but retrospectively proscribed, and those who by reason of virtual lifetime residence are aliens only by "legal imputation", (Judge Learned Hand) *U. S. ex rel. Mignozzi* v. *Day,* 51 Fed. 2d 1019, 1021 (2nd Cir., 1931) the legal fiction, that banishment is not punishment, should be discarded in the face of the brutal reality that punishment without judicial trial, punishment for past innocent conduct, and the cruel punishment of permanent exile, are inconsistent with Article I, section 9, of the Constitution, and with the Eighth Amendment.

The Justices of this Court have on many occasions recognized deportation as in fact a punishment or penalty equivalent to banishment and exile: " * * * [Deportation] is undoubtedly a harsh sanction that has a severe penal effect. * * * " *Trop* v. *Dulles,* 356 U. S. 86, 98 (Chief Jus-

tice Warren); "To banish [aliens] from home, family, and adopted country is punishment of the most drastic kind. * * * " *Lehmann* v. *United States,* 353 U. S. 685, 691 (Mr. Justice Black)." * * * [The] intrinsic consequences of deportation are * * * close to punishment for crime. * * * " *Galvan* v. *Press,* 347 U. S. 522, 531 (Mr. Justice Frankfurter). " * * * [A] life sentence of exile from what has become home, of separation from his established means of livelihood for himself and his family of American citizens * * * is a savage penalty." *Jordan* v. *DeGeorge,* 341 U. S. 223, 243 (Mr. Justice Jackson). " * * * [The] doom of deportation * * * in the case of those whose lives have been intimately tied to this country * * * [requires, in the case of an ambiguous statute, that] permissible construction consonant with humane considerations". *United States ex rel. Eichenlaub* v. *Shaughnessy,* 338 U. S. 521, 533-4 (Mr. Justice Frankfurther). " * * * [Deportation] may result * * * in loss of both property and life; or of all that makes life worth living." *Ng Fung Ho* v. *White,* 259 U. S. 276, 284 (Mr. Justice Brandeis).

Judge Learned Hand in *DiPasquale* v. *Karnuth,* 158 F. 2d 878, 879 (2nd Cir. 1947), stated that the deportation of one who "had come here as a boy" * * * was "in substance [exile]". In *United States ex rel. Klonis* v. *Davis,* 13 F. 2d 630, 631, he said, "Deportation [whether the alien came here in arms or at the age of ten] is to him a dreadful punishment, abandoned by the common consent of all civilized people * * * [That] our reasonable efforts to rid ourselves of unassimilable immigrants should in execution be attended by such a cruel and barbarous result should be a national reproach."

President Truman's Commission on Immigration and Naturalization included in its report a section entitled "Deportation as Punishment", stating in part, "In 1910 a statute was passed sanctioning the expulsion at any time of an alien identified with the business of prostitution.

Eventually the concept of deportation as punishment spread rapidly; today it is predominant in the deportation statutes." *Whom Shall We Welcome,* 200 (1953).

Notwithstanding such continued recognition that deportation when it amounts to banishment is a cruel and inhuman (if, unfortunately, not sufficiently unusual) punishment, the Court has upheld such banishments four times in the past eight years in the face of the contention that the action constituted attainder, an *ex post facto* law, and cruel and unusual punishment. *Harisiades* v. *Shaughnessy,* 342 U. S. 580; *Galvan* v. *Press,* 347 U. S. 522; *Marcello* v. *Bonds,* 349 U. S. 302; *Lehmann* v. *United States,* 353 U. S. 685.

In these cases the right of "Congress to legislate retrospectively" in non-criminal matters (*Lehmann*) is described as an "unbroken rule of this court" (*Harisiades*) "which has been followed from earliest times" (*Galvan*). The precedent cases which are said to close the issue, *Bugajewitz* v. *Adams,* 228 U. S. 585, 591, and *Mahler* v. *Eby,* 264 U. S. 32, 39,[9] will not sustain the weight thus thrust upon them.

While *Bugajewitz* has been frequently cited as authority for the proposition that Article I, Section 9 of the Con-

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[9] Mr. Justice Jackson in *Harisiades,* 342 U. S. at 594, n. 22, also cited *Fong Yue Ting* v. *United States,* 149 U. S. 698, 730 and *United States ex rel. Bilokumsky* v. *Tod,* 263 U. S. 149, Mr. Justice Frankfurter in *Galvan,* 347 U. S. at 532, cited *Ng Fung Ho* v. *White,* 259 U. S. 276, 280, and Mr. Justice Whitaker in *Lehmann* cited, in addition, *United States ex rel. Eichenlaub* v. *Shaughnessy,* 338 U. S. 521, *Harisiades, Galvan* and *Marcello* v. *Bonds,* 349 U. S. 302. Apparently *Fong Yue Ting, Bilokumsky* (involving a presumption of alienage from silence at a deportation hearing) and *Ng Fung Ho,* were cited as authority that deportation proceedings are civil in character. The only other pre-*Harisiades* case cited, *Eichenlaub,* was decided without reference to the "ex post facto" clause, but as previously noted, the dissenters, including Mr. Justice Frankfurter, refer to deportation in terms of punishment.

stitution has no application to deportation laws *generally*, it is, to say the least, questionable authority for that proposition. The warrant of arrest in *Bugajewitz* recited that "she was then [August 3, 1910] a prostitute and inmate of a house of prostitution, and that she was a prostitute at the time of entry, and entered the United States for purpose of prostitution, or for immoral purpose". 228 U. S. at 590. Her answer denied that she was a prostitute at the time of entry or that she entered to practice prostitution. Apparently, the question of an *ex post facto* application of the Act of March 26, 1910, was not raised by counsel for Bugajewitz. The constitutional question, which counsel attempted unsuccessfully to reopen, was whether Congress could delegate to administrative officers the authority to make determination of facts which if established would constitute a crime, or whether such determination must be made by the "judicial power". 57 L. Ed. 978, 979. The discussion as to whether the Act of March 26, 1910, was *ex post facto* legislation as applied to appellant, not raised by her counsel, was actually raised *by the Government instead*. *Johannessen* v. *United States*, 225 U. S. 227, 242, and *Fong Yue Ting*, *supra*, were cited as authority for the proposition that as applied the statute had no retrospective effect.

Since *Johannessen* was a denaturalization case involving citizenship obtained by fraud through false representations as to length of residence, and since *Fong Yue Ting* on its facts involved only the mode of proving legal entry the statement that "the prohibition of *ex post facto* laws * * * has no application * * * and with regard to petitioner, it is not necessary to construe the statute as having any retrospective effect" could well indicate that Bugajewitz was viewed by Mr. Justice Holmes as an "erroneously admitted alien", subject to ejection because of habits or characteristics present, but not discovered, at the time of entry.[10]

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[10] Hesse: Pre 1917 cases, 68 Yale L. J. 1578, 1621-25.

The other pre-*Harisiades* case involving the application of the "ex post facto" prohibition to deportation, *Mahler* v. *Eby,* 264 U. S. 32, was decided in favor of the alien's right to remain in the United States. However, the Court's opinion upheld the validity of the act which authorized deportation of aliens found to be "undesirable residents" as persons convicted under the Espionage Act in effectuating removal for war time acts.

In any event, these two cases, neither of which involved banishment, and one of which involved a prostitute of a little over five years residence, and the other a war measure, do not hold the broad and persuasive authority assigned to them in *Harisiades* and *Galvan.* Certainly they are not authority to authorize the banishment of a lifetime resident alien in the face of constitutional inhibitions against punishment by an *ex post facto* law, a bill of attainder, or by cruel and unusual measures.

Even if the question of whether the *ex post facto* prohibition applies to non-criminal laws is closed,[12] and even if this clause is not applicable to a deportation statute which inflicts punishment retrospectively on conduct innocent at the time it occurred, such a construction can not logically be placed upon the prohibition against bills of attainder. The essence of a bill of attainder is that it inflicts punishment upon a named individual, or upon an easily ascertainable group without judicial trial.[13] As the subject has been dealt with by petitioner, we are not here developing it further.

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[11] Hesse: Pre 1917 cases, 68 Yale L. J. 1578, 1584-86. Hesse: The Inherent Limits of the Power to Expel, 69 Yale L. J. text at notes 44 to 47.

[12] But see the dissenting opinion of Mr. Justice Douglas in *Marcello* v. *Bonds,* 349 U. S. at 319-20.

[13] See *The Constitutional Prohibition of Bills of Attainder: A Waning Guaranty of Judicial Trial,* 63 Yale L. J. 844.

The "fact of punishment" unconstitutionally inflicted in the guise of civil sanctions was recognized in *Speiser* v. *Randall,* 357 U. S. 513, where a taxpayer was required to execute an expurgatory oath in order to avoid paying a higher rate of taxes than those taking the oath. The Court held the statute in question violative of due process, by enforcing on the taxpayer the duty of proving himself "not guilty." Compare *Ex parte Garland,* 4 Wall. 333; *Cummings* v. *Missouri,* 4 Wall. 277.

Similarly, an applicant for admission to the Bar may not consistent with due process be prevented from practising his profession solely, or primarily, because of his membership in the Communist Party some twenty years earlier from 1934 to 1939 where the record is barren of any evidence that such membership constituted more than an unorthodox political faith. *Schware* v. *Board of Bar Examiners,* 353 U. S. 232, 244 to 246. Evidence of such past membership cannot justify the sanction of a conclusive presumption of bad moral character, so as to deny to an applicant the right to practice law. *Konigsberg* v. *State Bar of California,* 353 U. S. 252. The statutes and rules construed in these cases were not tested against Article I, section 9, of the Constitution, but rather against the due process clause of the Fourteenth Amendment. The path taken to reach the result is, however, strikingly similar to that involved in *Cummings* and *Garland.* In all cases where a right or privilege is withdrawn, or to be withdrawn, because of past conduct asserted to justify such sanction without judicial trial, shifting the burden from the Government to the one asserting the right or privilege, the result is punishment and the legislation invalidated.

Where the regulatory element of the sanction invoked is minimal, where the penalty is maximal, as it always is in cases of banishment, and especially where the conduct sought to be penalized was non-culpable when it occurred, the fact of punishment should be recognized. The protec-

tion of the constitutional prohibitions against such punishment should be invoked on behalf of the alien to protect him from the rigors of a fluctuating legislative policy which subject him to cruel and inhuman punishment for non-culpable conduct which occurred long in the past.

Article 1, section 9, and the Eighth Amendment, should prevent petitioner's banishment from his real home and an enforced exile in an alien land.

CONCLUSION

It is respectfully submitted that the judgment of the lower court be reversed.

Respectfully submitted,

OSMOND K. FRAENKEL,
120 Broadway,
New York, N. Y.,

LEONARD B. BOUDIN,
25 Broad Street,
New York 4, N. Y.

JOHN COUGHLAN,
220 Second & Cherry Building,
Seattle 4, Wash.,

SIEGFRIED HESSE,
2225 Parker Street,
Berkeley, Calif.

Attorneys for the National Lawyers Guild,
Amicus Curiae.

JAN 20 1960

JAMES R. BROWNING, Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1959

NO. 130

WILLIA NIUKKANEN, also known as WILLIAM NIUKKANEN, also known as WILLIAM ALBERT MACKIE,

Petitioner,

v.

EUGENE D. McALEXANDER, Acting District Director, District 31, Immigration and Naturalization Service,

Respondent.

PETITIONER'S REPLY BRIEF

REUBEN LENSKE,
Lawyers Building,
Portland 4, Oregon,
Attorney for Petitioner.

Of Counsel:
NELS PETERSON,
901 Loyalty Building,
Portland 4, Oregon,
GERALD H. ROBINSON,
1006 Failing Building,
Portland 4, Oregon.

STEVENS-NESS LAW PUB. CO. PORTLAND, ORE. 1-60

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Respondent.

PETITIONER'S REPLY BRIEF

1. Reply in support of the proposition that the statute under which Petitioner was ordered deported is unconstitutional.

The Government misunderstands the position of Petitioner with respect to other constitutional issues involving the statute in question. Petitioner does not waive the objections to the constitutionality of the statute based upon freedom of speech, due process of law, and ex post-facto. Each of these issues was timely raised and preserved throughout the proceedings in this case.

While Petitioner recognizes the holdings in the cases of *Galvan v. Press,* 347 U.S. 522 and *Harisiades v. Shaughnessy,* 342 U.S. 580, he does not agree with the doctrines announced by the Court in those cases, and urges that they be overruled.

However, because the Court has not passed upon the Bill of Attainder issue, and because certiorari has been denied to other petitions which requested reconsideration of the issues decided in *Galvan* and *Harisiades,* the stress of Petitioner's brief has been upon the Bill of Attainder issue.

The basic constitutional problem of the power of Congress to banish long-time residents of this country, which underlies the due process issue, has been discussed in the brief of the National Lawyers' Guild tendered *amicus curiae.* Petitioner adopts the position of the Guild as there expressed.

Moreover, the Guild's brief elaborates certain aspects of the question of whether deportation is "punishment." The points made are consistent with Petitioner's argument and are therefore adopted.

Turning to the merits of the Bill of Attainder issue, the Government builds its defense of the act upon a semantic point, namely the definition of the word "punishment."

The Government argues that for an act to be unconstitutional as a Bill of Attainder, it must impose criminal penalties. Deportation, the Government says, is not criminal punishment and therefore the act is not a Bill of Attainder (Br. 29-30).

This line of reasoning involves a basic mistake as to the nature of Bills of Attainder as defined historically. Bills of Attainder or Bills of Pains and Penalties were not necessarily criminal in nature. On the contrary, as was shown in *Ex Parte Garland,* 4 Wall 333, and *Cummings v. Missouri,* 4 Wall 277, as well as the more recent case of *United States v. Lovett,* 328 U.S. 303, such acts might merely involve the deprivation of salary or the impairment of the right to practice a profession.

The Bills of Attainder passed during the aftermath of the American Revolution did not impose criminal punishment, but were rather penalties imposed upon sympathizers of the British king. Indeed, the Bill of Attainder passed by the State of New York in October 1779 inflicted banishment on the former governor of New York, the Earl of Dunmore, and others. It declared that their property was confiscated to the State, and that they were banned from New York under penalty of death should they ever return.

It is clear that had this statute been passed after the enactment of the Federal Constitution, it would have been unlawful as a Bill of Attainder.

The Government argues that the provision for deporting Communist aliens is simply one enactment among many in a long line of legislative actions against specific groups, especially the Chinese and the anarchists (Br. 30).

But it should be pointed out that with respect to the Chinese, they were excluded from the United States, and

subsequent entry was illegal and subject to ejection, rather than to banishment as in this case. Here, there is no challenge to the legality of Petitioner's entry.

Moreover, with respect to anarchists, there has never been an "Anarchist Party." The enactment was one aimed at an ideology rather than "easily ascertainable members of a group." *United States v. Lovett,* 328 U.S. 303, 305.

The Government says that the Congressional action establishes a legislative policy, affirmed by *Harisiades,* that there is sufficient connection between past membership in the Communist Party and present desirability as a resident. In other words, the Government says the alleged membership of Petitioner in the Communist Party in 1937 is in and of itself, as a matter of law, proof that Petitioner's presence in the United States is a threat to its security and that he is undesirable and dangerous.

The absurdity of this statement is apparent. It is reinforced by the fact that no evidence of any misconduct or subversive act or thought was produced at the hearing on Petitioner's deportation. On the contrary, all of the evidence shows that Petitioner has conducted himself properly while within this country and would make a good citizen (Tr. 74).

It is interesting to note that the Government has failed to answer the other contentions of Petitioner in his argument that the act is a Bill of Attainder. Nowhere has the Government refuted the line of reasoning advanced by Petitioner or the authorities on which he relies.

The weakness of the Government's argument is a reflection of the inherent weakness of its position on the constitutionality of this act. It is a virtual admission that the act under which deportation proceedings have been taken against Petitioner is unconstitutional, and the Court should so rule.

2. Reply in support of proposition that the evidence shows that Petitioner's alleged membership in the Communist Party was not a meaningful political association under the rule of Rowoldt v. Perfetto, 355 U.S. 115.

The Government's long discussion of the evidence adduced at the deportation hearing fails to touch the nub of the Petitioner's interpretation of *Rowoldt v. Perfetto.* That is, that in order for an alien to be deported under the act, there must be "substantial and probative" evidence that he was a politically-aware, conscious and active member of the Communist Party after entry.

This level of evidence cannot be satisfied by vague inferences or suppositions. As the Court ruled in *Rowoldt,* a person who joined the Communist Party from sympathy with its economic and social welfare aims is not a person who is a politically active member under the law. Even the Government concedes that its own witnesses characterized Petitioner as not being a Party intellectual but "more interested" in "bread and butter" topics, including unemployment benefits and social security (Tr. 72, 75).

The other charges made against Petitioner are either

so vague as to raise serious doubts as to their meaning, or they can be dismissed because of the obvious lack of veracity of the Government witnesses or the inherent conflict in their testimony.

Contrary to the Government's assertion on page 25 of its Brief that there was no conflict between the testimony on the point of Petitioner's alleged role as a "functionary," the following testimony is pertinent:

QUESTIONS TO WITNESS WILMOT:

"Q. Did he hold any office in the Communist Party, as far as you were aware?

"A. To the best of my recollection, I think he was a functionary in the Albina Group. Secretary, I believe. I am not positive of that. That is my impression." (Tr. 15).

"Q. By functionaries what do you mean? People who performed full time work for the Party and got paid?

"A. Yes. I will say officials from now on. In a sense we were all functionaries." (Tr. 35).

QUESTIONS TO WITNESS KNIPE:

"Q. The question was, was Mr. Mackie a paid Communist Party functionary. Was he paid by the Communist Party?

"A. Not that I know of. I misinterpreted the question.

"Q. Was he a Communist Party functionary to your knowledge?

"A. No." (Tr. 68).

SPECIAL INQUIRY OFFICER TO WITNESS KNIPE:

"Q. By that you mean official of the party?

"A. No, he was not an official of the Party." (Tr. 68).

EXAMINING OFFICER TO WITNESS KNIPE:

"Q. What is your understanding Mr. Knipe as a functionary of the Party to be?

"A. A functionary, to my knowledge, is an active member who holds an office whether it be paid or unpaid, there are paid functionaries in organizations and unpaid functionaries." (Tr. 68).

It is therefore clear that both Wilmot and Knipe were talking about the same thing when they used the term "functionary." One testified that Petitioner was a functionary and secretary of the Albina Group and the other denied it.

Nor is it accurate to say (Br. 20-23) that *Rowoldt* did not alter to some degree the test of membership as defined by *Galvan*. The facts in *Rowoldt* were that the alien had a measure of association with the Communist Party from which a political awareness might be inferred. But inference is not enough under the *Rowoldt* decision. Substantial evidence of political awareness is necessary, and was found to be lacking in *Rowoldt* and is, it seems to us, absent in the case at bar.

Certainly evidence that Petitioner had conversations about "Communist Party matters" (Br. 7, 8, 9), without mention of the specific content of such alleged discussions, is an inadequate basis from which to speculate on Petitioner's political awareness.

The Government's argument has not affected the basic fact that Petitioner, during the period of time involved in this case, was grossly ignorant of Communist history and theory and interested only in economic and welfare activities. If indeed Petitioner was a member of

the Communist Party, that association was so unpolitical and tenuous as to be clearly within the *Rowoldt v. Perfetto* doctrine. On this ground too, Petitioner is entitled to relief.

CONCLUSION

There is insufficient "probative and substantial" evidence of Petitioner's political connection with the Communist Party to form the basis for his deportation. Moreover, the act under which the Government seeks to deport Petitioner is clearly a Bill of Attainder and is therefore unconstitutional.

If this Court does not care to reconsider the other constitutional issues, it may decide the case on one or both of the above points. But on one theory or the other, Petitioner is entitled to relief and respectfully requests the Court to reverse the judgment and dismiss the proceedings instituted against him.

Respectfully submitted,

REUBEN LENSKE,
Lawyers Building,
Portland 4, Oregon,
Attorney for Petitioner.

Of Counsel:
NELS PETERSON,
901 Loyalty Building,
Portland 4, Oregon,

GERALD H. ROBINSON,
1006 Failing Building,
Portland 4, Oregon.

MOTION FILED FEB 11 1960

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JAMES R. BROWNING, Clerk

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EUGENE D. McALEXANDER, Acting District Director, District 31, Immigration and Naturalization Service,

Respondent.

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

BLANCH FREEDMAN,
320 Broadway,
New York, N. Y.,

IRA GOLLOBIN,
1441 Broadway,
New York, N. Y.,

Attorneys for American Committee for Protection of Foreign Born. Amicus Curiae.

Adams Press Corp., 82 Beekman Street, N. Y.—Beekman 3-1050-51 110

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Respondent.

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

The American Committee for Protection of Foreign Born moves for leave to file a brief as *amicus curiae*. This application is made as petitioner's brief is essentially confined to a constitutional question and does not cover the antecedent and threshold question of statutory construction.

The statute 8 U. S. C. 1252(b)(4) provides: " * * * no decision on deportability shall be valid unless it is based on reasonable, substantial, and probative evidence."

Respondent has construed this to authorize deportation on a mere preponderance of proof not only in cases of illegal entrants but of petitioner, who has a lawful resident status of 50 years standing.

Counsel believes that "reasonable, substantial, and probative" as applied to expulsion proceedings against lawful permanent residents means "clear, convincing, and unequivocal." This construction would conform to Congressional intent and not subject the statute to constitutional infirmity as denying due process of law.

This question of statutory interpretation is presented in cases now pending with the Immigration and Naturalization Service (such as William Lahtinen, A-4236313; Leonard Costa, A-4823954) and is important to the general conduct of deportation proceedings against resident aliens.

The American Committee for Protection of Foreign Born is a national organization in existence for the past 26 years. The Committee concerns itself with education, legislation, and analysis of basic legal issues arising from enforcement of the Immigration and Nationality Act. The Committee endeavors to contribute to the full acceptance of the foreign born in American life on a plane of respect for their rights and recognition of their cultural, industrial, scientific, and other contributions. In furtherance of this program the Committee accordingly moves, in view of the general importance of the issues in the present case, for leave to file the following brief as *amicus curiae*.[1]

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[1] The written consent of petitioner to the filing of this *amicus* brief has been obtained. The consent of respondent has been denied by letter, a copy of which *amicus curiae* is filing with this brief.

BRIEF OF *AMICUS CURIAE*

Preliminary Statement of the Case

Petitioner has been a lawful permanent resident since his entry in 1909 at the age of ten months. He served honorably in World War II and is the head of a family.

Respondent commenced deportation proceedings, charging petitioner with membership in the Communist Party from 1937 to 1939. Petitioner categorically denied the charge. Two witnesses testified in support of the charge. No documentary corroboration was presented. Respondent held that a mere preponderance of proof sufficed and sustained the charge.

POINT I

The statutory scheme shows Congressional intent that deportation of permanent resident aliens be based on "clear, convincing, and unequivocal evidence" and not a mere preponderance of evidence.

The Immigration and Nationality Act (8 U. S. C. 1101 *et seq.*) explicitly recognizes two classes of aliens, delimited under "Title II—Immigration" and "Title III—Nationality and Naturalization." The first comprises those seeking admission who can be excluded, as well as illegal entrants, and those overstaying temporary admission who can be expelled. None of these possess lawful permanent residence. The second class consists of aliens who are lawful permanent residents. These possess, in addition to residence, the right on certain conditions to naturalization. Such aliens relying on the security of their status have families and acquire property. The statutory scheme shows

on its face that Congress made a basic distinction in the substantive rights of resident and non-resident aliens.

As regards deportation proceedings, Congress specified that the decision be based on "reasonable, substantial, and probative evidence." "Reasonable" is a relative term. A first and fundamental aspect of a reasonable procedure is that it have a reasonable relationship to the substantive end. "Reasonable" here implies rational, just, and appropriate,[2] considering the basic statutory classification of non-residents and residents (Title II and Title III of the Act). Procedure is a means to effectuate the substantive end, and rationally corresponds to the different rights involved.[3] The words "reasonable, substantial, and proba-

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[2] *Broad & Branford Place Corp.* v. *J. J. Hockenjos Co.*, 132 N. J. L. 229, 232, 39 A. 2d 80, 82; *Le Cuno Oil Co.* v. *Smith*, Tex. C. A., 306 S. W. 2d 190, 195.

[3] In *Bonnett* v. *Vallier*, 136 Wisc. 193, 203-204, 116 N. W. 885, 888, 7 L.R.A., N.S. 486 the Court wrote:

> "It is said that an attempt to give a specific meaning to the word 'reasonable' is 'trying to count what is not number, and measure what is not space.' Altschuler v. Coburn, 38 Neb. 881, 890, 57 N. W. 836, 838. It is not synonymous with 'expediency.' Matters of that sort are wholly for legislative cognizance. As applied to means to a legitimate end it suggests not necessarily the best or the only method, but one fairly appropriate at least under all the circumstances. In the ultimate, the scope of the term as regards any situation must be measured having regard to the fundamental principles of human liberty, as they were understood at the time of the formation of the Constitution and were intended to be impregnably entrenched thereby, adapting the same, of course, to our modern conditions * * *. It (reasonable) is what 'from the calm sea level' so to speak, of common sense, applied to the whole situation, is not illegitimate in view of the end to be attained. In determining that, the court must look to the language of the statute and to all the facts bearing on the situation of which it may properly be sai i to judicially know because of their common nature or otherwise."

tive" do not exist in a vacuum, divorced from their context. The statutory procedure must be construed to conform with the substantive purpose of the Act, which differentiates between the rights of residents and all other aliens.

This statutory distinction comports with the great difference in the factual issues presented between deportation cases of residents and illegal entrants. In cases of residents, the factual and legal issues are frequently complex, go far back in the past, involve loss of a long possessed lawful status, and of long-established family and property ties.[4] In cases of illegal entrants the issues are commonly simpler, relate to recent events, and do not involve loss of a lawful status or long-established family and property ties.

The gloss given the statute by respondent has ignored these fundamental statutory and factual distinctions. Respondent has held that all aliens, both resident and nonresident, can be deported on a mere preponderance of evidence. This obliterates at a critical point the different substantive and procedural scheme provided by Congress for two classes of aliens. The lawful resident here for a lifetime is, as regards the procedure governing the retention of his status, reduced to the plane of an illegal entrant here for a day. The resident's right to remain becomes subject to defeasance by the narrowest balancing of a mere preponderance of evidence. In view of the far more grave and difficult issues involved, a larger margin of safety against

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[4] Cf. *Rowoldt* v. *Perfetto*, 355 U. S. 115; *Galvan* v. *Press*, 347 U. S. 522, 531; *United States ex rel Eichenlaub* v. *Shaughnessy*, 338 U. S. 521; *Lehmann* v. *United States*, 353 U. S. 685.

Many cases against residents involve the stale testimony of unreliable informers.

error in the protection of the cherished right of lawful residence is "reasonable."[5]

Congress did not indicate that the standard—"reasonable, substantial, and probative"—dictates or sanctions a criterion of evidence (a mere preponderance) so inherently susceptible in resident cases to arbitrary results. On the contrary, the manifest structure of the Immigration and Nationality Act (Titles II and III) evinces Congressional intent to afford resident aliens a greater measure of procedural protection in the retention of their status.

By comparison, revocation of naturalization requires "clear, convincing, and unequivocal evidence." Loss of the right to reside here, banishment, can manifestly be even more serious than loss of citizenship. This Court has repeatedly noted the grave consequence of deportation of lawful residents. An equal standard of proof is warranted in both instances. Only in this way can the statutory standard be "Reasonable: Conformable or agreeable to reason; just; rational" Bouvier's Law Dictionary (Rawle's 3rd Revision).

The acquisition and loss of rights by resident aliens are *in pari materia*. Congress gives resident aliens an equal procedural measure of protection in the acquisition of further rights through naturalization, as in the retention of those they already possess through lawful residence.

The minutest examination of the statute does not disclose any language or purpose which specifically or by implication support respondent's contention that residents can be

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[5] In a deportation case of a longtime lawful resident the Court held that she "would seem entitled to have in her trial at least those safeguards given to an accused in a felony case if not those granted to an accused in a capital case." *Petrowicz* v. *Holland*, D. C. E. D. Pa., 1956, 142 F. Supp. 369, 373.

deported on a mere preponderance of evidence. It can be assumed *arguendo* that to "construe this statutory provision less generously to the alien might find support in logic. But since the stakes are considerable for the individual, we will not assume that Congress meant to trench on his freedom beyond that which is required by the narrowest of several possible means of the words used." *Fong Haw Tan* v. *Phelan*, 333 U. S. 6, 10.

The construction that "reasonable, substantial, and probative" requires (in deportation proceedings against residents) "clear, convincing, and unequivocal evidence" will assure that "solidity of proof" (*Rowoldt* v. *Perfetto*, *supra*) requisite to such cases.

POINT II

Due process requires that an order of deportation banishing a permanent resident be supported by "clear, convincing, and unequivocal evidence."

The statute has prescribed that proof be "reasonable, substantial, and probative." But the application of that standard, its interpretation in a particular case, has not been explicitly stated by Congress. This is the responsibility of the courts who construe the language in accordance with the intent of Congress and in case of conflicting meanings avoid, if possible, a construction which would lead to denial of due process of law or other constitutional infirmity.

A resident alien cannot be deprived of liberty in a criminal case except by proof beyond a reasonable doubt. Statutes of limitation, in addition, establish limits such as five years in the State of New York for all crimes except murder and kidnapping (New York Code of Criminal Procedure,

Sec. 142). Yet the statutory construction maintained by respondent would permit, on the basis of a mere preponderance of evidence, the loss by petitioner of the very right to remain in the United States, and his banishment to a strange land he left as an infant, an extremely severe punishment. And this on the basis of testimony as to events extending back to 1937-1939.[6]

Important considerations of public policy have motivated the Federal Government and the States to enact statutes of limitation for various civil proceedings and all but the most serious crimes. The "very existence of the statute (of limitations) is a recognition of and notification by the Legislature of the fact that time, while it gradually wears out proofs of innocence, has assigned to it fixed and positive periods in which it destroys proofs of guilt." 1 Wharton, *Criminal Procedure* (10th Ed.) 415, Sec. 367.[7]

The resident alien who like all others is protected in his liberty by statutes of limitation has none as to proceedings to terminate his very right to remain in the United States. If the property and civil rights of a resident alien are fully entitled to equal protection of the laws and other constitutional safeguards, equally the foundation for these rights, his status as a permanent resident is entitled to the protection of a full and not a partial measure of due process of law. To sanction "loss of all that makes life worth living" (*Ng Fung Ho* v. *White*, 259 U. S. 276, 284) on a mere pre-

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[6] In a deportation proceeding against a resident, William Lahtinen A 4236313, pending in the New York City District, government witnesses testified as to events in 1906.

[7] Such a statute serves to prevent mistakes, perjuries and frauds. *Riddlesbarger* v. *Hartford Fire Ins. Co.*, 74 U. S. 386, 390; *Bell* v. *Morrison*, 26 U. S. 351, 360; *Freman* v. *Sheaffer Pen Co.*, D. C. N. D. Iowa, 1953, 111 F. Supp. 39, 47, *People* v. *Ross*, 325 Ill. 417, 156 N. E. 303, 304.

ponderance of evidence and unreliable evidence extending into the remote past, cannot square with "essential standards of fairness" (*Bridges* v. *Wixon,* 326 U. S. 135, 154).

There is a fundamental constitutional difference between the status of a resident and of a non-resident. Exclusion of immigrants and expulsion of illegal entrants or overstayed non-immigrants (e.g. visitors, students, seamen) or those admitted because of an error made in inspection—all these may not pose constitutional problems. But expulsion of those lawfully admitted for permanent residence, for conduct after entry—in essence banishment—does raise constitutional issues. Deportation in such cases constitutes not merely ejection but loss also of a resident status and therefore banishment.[8] Protection of that status has equal and often greater importance than retention of naturalization. The foundation, lawful residence, is entitled to the same measure of procedural protection as the capstone, naturalization.

Certain deportation cases based on criminal convictions implicitly involve adherence to the standard of "clear, convincing, and unequivocal evidence." *Lehmann* v. *United States,* 353 U. S. 685; *Jordan* v. *De George,* 341 U. S. 223. The conviction, the ground on which deportation in such cases is predicated, is established by proof beyond a reasonable doubt. Not only in these cases but in all cases of deportation of residents clear, convincing, and unequivocal evidence should be required. It is anomalous to permit the

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[8] Exclusion of immigrants or their expulsion because of wrongful admission is qualitatively different from expulsion of properly admitted aliens because of post-admission conduct. The latter is more properly designated as banishment and its constitutional basis is questionable. Hesse, The Constitutional Statutes of the Lawfully Admitted Permanent Resident Alien: The Inherent Limits of the Power to Expel (two articles), 68 Yale L. J. 1578 and 69 Yale L. J. 262.

deportation of one who has committed no crime and whose conduct may have been little more than political unorthodoxy—at a time also when the statute did not make that conduct a ground for deportation—upon a bare preponderance of the evidence as determined by administrative officers, when in the case of those deported for criminal conduct, the conviction upon which the deportation is based must be established by evidence beyond any reasonable doubt and subject to all of the protections of due process in a judicial trial of a criminal case.

CONCLUSION

It is respectfully submitted that the judgment of the lower court should be reversed.

Respectfully submitted,

BLANCH FREEDMAN
320 Broadway
New York, N. Y.

IRA GOLLOBIN
1441 Broadway
New York, N. Y.
Attorneys for the American Committee for Protection of Foreign Born, Amicus Curiae.

SUPREME COURT OF THE UNITED STATES

No. 130.—October Term, 1959.

Willia Niukkanen, etc., Petitioner, *v.* E. D. McAlexander, etc. } On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[April 18, 1960.]

Per Curiam.

The petitioner sought relief from an order directing his deportation on the ground that as an alien he had become, after entering the United States, a member of the Communist Party within the meaning of the Act of October 16, 1918, as amended by § 22 of the Internal Security Act of 1950, 64 Stat. 987, 1006. The District Court, after hearing, denied the petition, 148 F. Supp. 106, and the Court of Appeals affirmed. 241 F. 2d 938. Invoking *Rowoldt* v. *Perfetto*, 355 U. S. 115, decided after the order for his deportation, petitioner sought an administrative reconsideration of his status. Upon its denial by the Board of Immigration Appeals he began the judicial proceeding immediately before us for review. After a hearing, the District Court again denied his petition for relief and the Court of Appeals affirmed the order of the District Court. 265 F. 2d 825. The ultimate question is whether petitioner is subject to deportation under *Galvan* v. *Press*, 347 U. S. 522, or is saved from it under *Rowoldt* v. *Perfetto, supra*. The determination of this issue turns on evaluation of the testimony before the District Court, in light of *Galvan* v. *Press, supra*, and *Rowoldt* v. *Perfetto, supra*. Such assessment largely depends on the credibility of the testimony on which the district judge based his judgment, particularly that of the petitioner himself, whom the judge saw and heard. An able judge found

that petitioner in denying membership in the Communist Party, unlike Rowoldt who admitted membership, see 355 U. S., at 116–117, but accounted for its innocence, "perjured himself before, and I believe perjured himself today." We cannot say that his findings, affirmed by the Court of Appeals, were clearly erroneous and do not support the conclusion of both the lower courts.

Judgment affirmed.

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Mr. Justice Douglas, with whom The Chief Justice, Mr. Justice Black, and Mr. Justice Brennan concur, dissenting.

Petitioner was born in Finland in 1908; and came here when he was less than a year old and has resided here ever since. He is married to a native-born citizen; he served honorably in our Army; and he has no criminal record of any kind except for a petty offense, back in 1930.

The evidence against petitioner was given by two witnesses who had once been Communists, one of whom petitioner swore he never knew. They testified that petitioner was a member of the Communist Party from 1937 to 1939 in Portland, Oregon. One of them testified that petitioner had assisted in the circulation of a paper, Labor New Dealer, which apparently was an organ of the Party. There was evidence he paid dues to the Party of 25 cents a month and that he attended both open and closed meetings of the Party. But even these two ex-Communists who appeared against petitioner said that there was no discussion of ways and means to overthrow the government at those meetings, that only problems such as labor conditions, relief, and the like were discussed. One also swore that petitioner never advocated the overthrow of the government. Petitioner's interest in the Party, according to one of these hostile witnesses, was as a result of "the sufferings of the people in the depression"; and

he was "very sympathetic toward their welfare." This witness agreed that petitioner was not an intellectual interested in "theory" or "political discussion." His interests were "in bread and butter topics of the day, what to do for unemployment and relief." Nor had petitioner ever taught the Communist doctrine nor distributed its literature, except for the Labor New Dealer.

These two ex-Communists testified that petitioner attended dances that the Party arranged in Portland. But they said he never held an office in the Party; nor was ever employed by the Party; nor was ever a "functionary" in the sense of representing the Party. He attended a regional meeting at Aberdeen, Washington, where various speakers, according to one ex-Communist, gave "glowing accounts" of their work for the Party, "more or less fabricating" their achievements.

We know from petitioner's lips that he was not acquainted with the conventional Communist literature; and nothing came from the lips of his accusers that denied it. One who reads the whole of this record cannot put it down without feeling that here is a man neither conspiratorial, dangerous, cunning, nor knowledgeable. Petitioner—a painter by trade—represents a microscopic element in the ranks of our labor force who was caught up in a movement whose ideology he did not understand and whose leaders spoke in terms of bread for the hungry, and jobs for the unemployed. He has recently earned about $4,000 a year; he bought a home for $3,100 (which is now worth from $6,000 to $6,500 subject to a $2,500 mortgage); and he has personal property, including a car, worth $2,000.

This is the background against which the following testimony can be best understood.

> "Q. In the Finnish Hall or anywhere else did you attend Communist Party meetings?

"A. Well, if I said yes and if I said no maybe I wouldn't be telling the truth, because I really couldn't tell one way or the other. I went to meetings there. Sometimes maybe they were Communist, and maybe they wasn't. It could have been and maybe they wasn't.

. . . . .

"Q. Have you been a member of the Communist Party of the United States or any branch or affiliate or organization by that name or any similar name?

"A. Knowingly, I haven't, no.

. . . . .

"Q. Do you believe that membership in the Communist Party now is a lawful political purpose?

"A. No. I can't answer questions about that because I don't know. If Congress says it is unlawful, it is unlawful. If it isn't, it isn't. I don't know. If I got the question right, I don't know.

"Q. I am not trying to confuse you, . . . I am trying to find out your feelings toward Communism.

"A. Naturally I don't—Communism or socialism, I don't care what party it is here or any place else, if it has anything to do with overthrowing the government by force and violence I don't agree with it, no.

. . . . .

"Q. What was your impression of what the Communist Party was trying to do?

"A. Well, the only thing I heard in those days was more relief and more work, and I never heard anything else; no violent overthrow of the Government, or anything of that sort, but anyplace I went to meetings was always more work and more food.

"Q. As far as you know, that was what the Communist Party stood for during that period?

"A. I don't know if they stood for that, but I never heard anything against it."

The case is on all fours with *Rowoldt* v. *Perfetto,* 355 U. S. 115. The "solidity of proof" (*id.,* at 120) required for the severe consequences of the deportation of a man who came here when he was less than one year old, whose only memory of life is in this land, and who has lived here over 50 years has not been met. The "meaningful association" with the Party which the *Rowoldt* case requires (*id.,* at 120) simply has not been established here. In this case, as in *Rowoldt,* petitioner's association with the Party was "wholly devoid of any 'political' implications." *Id.,* at 120.

The testimony of the two ex-Communists upon which petitioner is being banished has never been heard by a court. The only testimony taken by the District Court was that of the petitioner and his character witnesses. The district judge believed the witnesses against Niukkanen by virtue of having read the same record that is now before this Court. His impression of their credibility can be no more reliable than our own. Certainly then his conclusion that petitioner "perjured himself before, and . . . perjured himself today" does not preclude this Court's review of the evidence against him. Apart from that, the evidence would be far too meagre to establish the "meaningful association" which we required in the *Rowoldt* case.

The unanimity of all the finders of fact in the *Rowoldt* case (*id.,* at 119) that Rowoldt was a "member" of the Party and his refusal to answer when asked in the deportation proceedings whether he had ever been a member of the Communist Party, did not stop us from declaring that "the record before us is all too insubstantial to sup-

port the order of deportation." *Id.*, at 121. The unanimity of the finders of fact in the present case should likewise be no barrier to our entry of a just decree. A man who has lived here for every meaningful month of his entire life should not be sent into exile for acts which this record reveals were utterly devoid of any sinister implication.